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FINDING OUR WAY HOME: ACHIEVING THE POLICY GOALS OF NAGPRA

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

JUNE 16, 2011

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FINDING OUR WAY HOME: ACHIEVING THE POLICY GOALS OF NAGPRA

THURSDAY, JUNE 16, 2011

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:40 p.m. in room 628, Dirksen Senate Office Building, Hon. Daniel K. Akaka, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. DANIEL K. AKAKA, U.S. SENATOR FROM HAWAII

The CHAIRMAN. This hearing of the Committee on Indian Affairs will come to order.

Welcome to the Committee's oversight hearing on Finding Our Way Home: Achieving the Policy Goals of NAGPRA.

For thousands of indigenous ancestors, the road home has been a difficult one. Many have not been able to begin their journey home as they, along with their sacred objects, fell into the possession of the Federal Government and museums across the Country. This was the result of archaeological excavations, construction projects and museum and university research.

I know this can be painful and deeply personal topic for many native peoples. My own people believe the Mana, the spirit and power of a person, rests in the bones and connects families between the generations. Native Hawaiian tradition holds that what affects the bones can affect the future lives of the progeny and the after lives of the ancestors of those bones.

Native Hawaiian burials are some of the most secretive in the world, and I smile because we are still looking for some of the places and the bones. Native Hawaiian children today are still taught what to do if they encounter any ancestral bones. When my people think about those 'iwi kupuna or those ancestors, whose bones are subjected to scientific scrutiny, display or catalogue storage, there is a sense of outrage and sorrow over the failure to care for the bones as our tradition requires.

Our kinship and active connection with the remains of our forbears and the objects that were sacred enough to warrant burial with them is not unique. Native peoples across the United States feel this connection. Acknowledging this connection, the policy of repatriation was born.

Both the National Museum of the American Indian Act and the Native American Graves Protection and Repatriation Act estab-

lished procedures for repatriation. Yet, over 20 years after the enactment of these two laws, GAO found many Federal agencies have not fully complied with NAGPRA. In addition, the Smithsonian has much work to do in order to comply with the Museum Act.

Today, we will hear from the GAO about their findings and from the Administration and Smithsonian about what they are doing to comply with Federal laws.

Finally, we will hear from tribal leaders about their experiences, challenges and ideas to improve the process.

As many of you have noticed, the Committee works in a bipartisan manner. It is always a pleasure to be working with the other side of the aisle, and right now a very close friend. We both belong to States not connected to the lower 48 that have large indigenous populations. Senator Murkowski and I have worked so closely on Native issues and she is doing a terrific job here for her State of Alaska.

And I would like to ask her whether she has any opening statement to make.

STATEMENT OF HON. LISA MURKOWSKI,
U.S. SENATOR FROM ALASKA

Senator MURKOWSKI. I appreciate you have held this hearing this afternoon on how we achieve the policy goals of the Native American, the Repatriation Act, and how we, as you say, bring it home. And it is an important issue for so many Alaska natives from Barrow down to Ketchikan. And I appreciate the attention that you are giving through this hearing.

I look forward to the witnesses today and working with many of you on many of the issues that are so important to us.

The CHAIRMAN. Thank you very much.

As Chairman, it is my goal to ensure that we hear from all who want to contribute to the discussion. So the hearing record is open for two weeks, I just want you to know that. So if you are thinking of something and you are not one of the witnesses, you can still let us know to these letters. And I encourage everyone to submit your comments through your written testimony that you may send in.

I want to remind the witnesses to please limit your oral testimony to five minutes today.

Serving on our first panel, from the GAO, Natural Resources and Environment Division, is Director Anu Mittal. She is accompanied by Jeffrey Malcolm, the Assistant Director.

And I want to say welcome to all, and Ms. Mittal, it is so good to have you here. So please proceed with your testimony.

STATEMENT OF ANU MITTAL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT DIVISION, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; ACCOMPANIED BY JEFF MALCOLM, ASSISTANT DIRECTOR

Ms. MITTAL. Chairman Akaka and Senator Murkowski, thank you for inviting us to participate in your hearing on repatriation issues. Accompanying me, as you mentioned, is Jeff Malcolm, the Assistant Director at GAO who manages our work on Native American issues.

As you mentioned, GAO recently issued two reports: one on Federal agency implementation of NAGPRA; and one on the Smithsonian's efforts under the National Museum of the American Indian Act. I would like to briefly highlight some of the key findings from both reports.

With regard to Federal efforts to implement NAGPRA, our review found that after almost 20 years, Federal agencies have not yet fully complied with all of the requirements of the Act. We found that the amount of work Federal agencies put into identifying their NAGPRA items and the quality of the documents that they prepared varied widely. As a result, only a few agencies had a high level of confidence that they had identified all of the NAGPRA items in their historical collections.

We also reviewed the actions of the National NAGPRA Office and identified two concerns with how it carried out some of its responsibilities. For example, we found that the National NAGPRA Office developed a list of Indian tribes for NAGPRA purposes that is inconsistent with BIA's policy for federally recognized tribes. And we found that the National NAGPRA Office did not always properly screen nominations for the NAGPRA Review Committee and inappropriately recruited nominees contrary to the processes laid out in the Act.

The third NAGPRA-related area of concern that we identified was a lack of systematic and comprehensive process to track repatriation activities and the lack of a mechanism for reporting this information to a central source. As a result, this information is not readily or easily available to the tribes or to Congress.

Based on our own independent data collection efforts, we determined that as of September 2009, Federal agencies had repatriated a total of 55 percent of the human remains and 68 percent of the associated funerary objects that they had identified for repatriation.

Shifting to our review of the Smithsonian, we found that the Smithsonian also has much work remaining to identify and repatriate the Indian human remains and objects in its collections that are subject to the NMAI Act. Specifically, we found that in the last 21 years, the Smithsonian has only offered for repatriation about one-third of the human remains that may be in its collection.

Contributing to this slow process is the lengthy and resource-intensive process that the Smithsonian uses to identify and affiliate its repatriation items. As a result, we suggested that Congress may wish to take certain actions to expedite this process.

In addition, we identified four areas of concern in the Smithsonian's implementation of certain repatriation-related activities. First, although the Smithsonian established a Review Committee as required by the Act, it limited the committee's oversight to the repatriation activities of the Natural History Museum, which we believe is inconsistent with the Act.

Second, we found that neither the Smithsonian nor the Review Committee submit annual reports to Congress on the progress of repatriation. Although there is no annual reporting requirement in the NMAI Act, given that the Smithsonian's repatriation activities have continued well past the original estimated five years, and may

take several more decades to complete, we believe that such information should be provided to Congress.

Third, the Smithsonian has no independent appeals process for tribes in the event of a dispute, and we believe that such an appeals process should be established.

Finally, the Smithsonian does not have a policy on the disposition of culturally unidentifiable items. The NMAI Act does not discuss how these items should be handled and the museum's repatriation policies do not cover this issue either.

Based on the findings of our reports, we made five recommendations to improve Federal agency's compliance with NAGPRA and four recommendations to improve the Smithsonian's compliance with the NMAI Act. The agencies and the Smithsonian generally agreed with our recommendations and have stated that they will begin to implement them. We will continue to monitor their progress.

In conclusion, Mr. Chairman, our two studies clearly show that after two decades of effort, much work still remains to be done to address the goals of both NAGPRA and the NMAI Act. In this context, we believe that it is imperative for the agencies to implement our recommendations to ensure that they are efficiently and effectively fulfilling their statutory responsibilities.

This concludes our prepared statement. Jeff and I would be pleased to answer any questions that you might have.

[The prepared statement of Ms. Mittal follows:]

PREPARED STATEMENT OF ANU MITTAL, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT DIVISION, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Chairman Akaka, Vice Chairman Barrasso, and Members of the Committee:

I am pleased to be here today to participate in your hearing on federal efforts to repatriate Indian and Native Hawaiian human remains and certain cultural objects. Many federal agencies have acquired thousands of Indian human remains, funerary objects, sacred objects, and objects of cultural patrimony over hundreds of years. Similarly the Smithsonian Institution has acquired its collections since its establishment in 1846. These human remains and cultural objects have long been a concern for many Indian tribes and Native Hawaiian communities, who have been determined to provide an appropriate resting place for their ancestors. The National Museum of the American Indian Act (NMAI Act) and the Native American Graves Protection and Repatriation Act (NAGPRA) were enacted, in 1989 and 1990 respectively, in part to address these concerns.[1] The acts generally require the Smithsonian Institution and federal agencies to take certain actions to identify the Indian and Native Hawaiian human remains and cultural objects in their collections, affiliate those remains and objects to a tribe, and upon request repatriate the items to the tribes.[2]

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[1]National Museum of the American Indian Act, Pub. L. No. 101-185, 103 Stat. 1336-47 (1989), *codified as amended at* 20 U.S.C. §§ 80q to 80q-15. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048-58 (1990), *codified at* 25 U.S.C. §§ 3001-3013. NAGPRA uses the term *Native American*, while the NMAI Act uses the term *Indian*. In this statement's discussion of each law, we will use the term used in that law. In the rare instances where we refer to the items covered by both acts collectively, we will simply use the term *Indian*.

[2]NAGPRA defines a federal agency as any department, agency, or instrumentality of the United States, except the Smithsonian Institution. NAGPRA also applies to museums and defines them as any institution or state or local government agency, including any institution of higher learning, that receives federal funds and has possession of, or control over, Native American cultural items, except the Smithsonian Institution. In addition, unless otherwise specified, in this statement the terms objects and cultural objects refer to funerary objects, sacred objects, and objects of cultural patrimony.

In July 2010, we reported on the implementation of NAGPRA by eight key federal agencies with significant historical collections.[3] These agencies included the Department of the Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Bureau of Reclamation (BOR), U.S. Fish and Wildlife Service (FWS), and National Park Service (NPS); the Department of Agriculture's U.S. Forest Service; the U.S. Army Corps of Engineers (Corps); and the Tennessee Valley Authority (TVA). In May 2011, we reported on the Smithsonian Institution's implementation of the NMAI Act's repatriation requirements as they relate to the collections held by the National Museum of the American Indian and the National Museum of Natural History.[4] Our testimony today summarizes the findings of both of these reports and also includes information on some recent actions that the agencies have taken in response to the recommendations we made in our reports. Both of these reports were performance audits that were conducted in accordance with generally accepted government auditing standards. A detailed description of our scope and methodology is presented in each issued report.

Background

NAGPRA Requirements

NAGPRA requires federal agencies to (1) identify their Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, (2) try and determine if a cultural affiliation exists with a present day Indian tribe or Native Hawaiian organization, and (3) generally repatriate the culturally affiliated items to the applicable Indian tribe(s) or Native Hawaiian organization(s) under the terms and conditions

[3]GAO, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*, GAO-10-768 (Washington, D.C.: July 28, 2010). NAGPRA has a separate provision for Native American items newly excavated or discovered on federal or tribal lands after the date of enactment, referred to as new or inadvertent discoveries and intentional excavations. New or inadvertent discoveries and intentional excavations are covered in section 3 of the act (25 U.S.C. § 3002) and the identification and repatriation of NAGPRA items within collections that existed on or before the date of enactment, referred to as historical collections, are covered in sections 5, 6, and 7 (25 U.S.C. §§ 3003-3005). In accordance with NAGPRA's implementing regulations, section 5, 6, and 7 also apply to collections federal agencies and museums acquire, from sources other than federal or tribal land, after NAGPRA's enactment. Our July 2010 report focused on federal agencies' historical collections.

[4]GAO, *Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects*, GAO-11-515 (Washington, D.C.: May 25, 2011).

prescribed in the act. NAGPRA covers five types of Native American cultural items (see table 1).

Table 1: Five Types of Native American Cultural Items Covered by NAGPRA

Item	Definition
Human remains	Physical remains of the body of a person of Native American ancestry. 43 C.F.R. § 10.2(d)(1).
Associated funerary objects	Objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. 25 U.S.C. § 3001(3)(A).
Unassociated funerary objects	Objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. 25 U.S.C. § 3001(3)(B).
Sacred objects	Specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. 25 U.S.C. § 3001(3)(C).
Objects of cultural patrimony	Objects having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. 25 U.S.C. § 3001(3)(D).

Source: NAGPRA and its implementing regulations.

NAGPRA's requirements for federal agencies, museums, and the Secretary of the Interior, particularly the ones most relevant to their historical collections, which were the focus of our July 2010 report, include the following:

- *Compile an inventory and establish cultural affiliation.* Section 5 of NAGPRA requires that each federal agency and museum compile an inventory of any holdings or collections of Native American human remains and associated funerary objects that are in its possession or control. The act requires that the inventories be completed no later than 5 years after its enactment—by November 16, 1995—and in consultation with tribal government officials, Native Hawaiian organization officials, and traditional religious leaders. In the inventory, agencies and museums are required to establish geographic and cultural affiliation to the extent possible based on information in their possession. Cultural affiliation denotes a relationship of shared group identity which can be reasonably

traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.[5] Affiliating NAGPRA items with a present day Indian tribe or Native Hawaiian organization is the key to deciding to whom the human remains and objects should be repatriated. If a cultural affiliation can be made, the act requires that the agency or museum notify the affected Indian tribes or Native Hawaiian organizations no later than 6 months after the completion of the inventory. The agency or museum was also required to provide a copy of each notice—known as a notice of inventory completion—to the Secretary of the Interior for publication in the *Federal Register*. The items for which no cultural affiliation can be made are referred to as culturally unidentifiable.[6]

Compile a summary of other NAGPRA items. Section 6 of NAGPRA requires that each federal agency and museum prepare a written summary of any holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony in its possession or control, based on the available information in their possession. The act requires that the summaries be completed no later than 3 years after its enactment—by November 16, 1993. Preparation of the summaries was to be followed by federal agency consultation with tribal government officials, Native Hawaiian organization officials, and traditional religious leaders. After a valid claim is received by an agency or museum, and if the other terms and conditions in the act are met, a notice of intent to repatriate must be published in the *Federal Register* before any item identified in a summary can be repatriated.[7]

Repatriate culturally affiliated human remains and objects. Section 7 of NAGPRA and its implementing regulations generally require that, upon the request of an Indian tribe or Native Hawaiian organization, all culturally affiliated NAGPRA items be returned to the applicable Indian tribe or

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[5]25 U.S.C. § 3001(2).

[6]NAGPRA's implementing regulations direct federal agencies and museums to retain possession of culturally unidentifiable human remains pending promulgation of 43 C.F.R. § 10.11 (the regulation to govern the disposition of culturally unidentifiable human remains) unless legally required to do otherwise, or recommended to do otherwise by the Secretary of the Interior. Recommendations regarding the disposition of culturally unidentifiable human remains may be requested prior to final promulgation of 43 C.F.R. § 10.11. 43 C.F.R. § 10.9(e)(6). The regulation to govern the disposition of culturally unidentifiable human remains, 43 C.F.R. § 10.11, was promulgated on March 15, 2010, and became effective on May 14, 2010. 75 Fed. Reg. 12378 (Mar. 15, 2010).

[7]43 C.F.R. § 10.8(f).

Native Hawaiian organization expeditiously—but no sooner than 30 days after the applicable notice is published in the *Federal Register*—if the terms and conditions prescribed in the act are met.

NAGPRA assigns certain duties to the Secretary of the Interior, which are carried out by the National NAGPRA Program Office (National NAGPRA) within NPS. In accordance with NAGPRA's implementing regulations, National NAGPRA has developed a list of Indian tribes and Native Hawaiian organizations for the purposes of carrying out the act. The list is comprised of federally recognized tribes, Native Hawaiian organizations, and, at various points in the last 20 years, corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA).[8] Since the enactment of two recognition laws in 1994,[9] BIA has regularly published a comprehensive list of recognized tribes—commonly referred to as the list of federally recognized tribes—that federal agencies are supposed to use to identify federally recognized tribes. The recognition of Alaska Native entities eligible for the special programs and services provided by the United States to Indians because of their status as Indians has been controversial. Since a 1993 legal opinion by the Solicitor of the Department of the Interior,[10] BIA's list of federally recognized tribes has not included any ANCSA group, regional, urban, and village corporations.

Finally, NAGPRA requires the establishment of a committee to monitor and review the implementation of inventory, identification and repatriation activities under the act. Among other things, the Review Committee is responsible for, upon request, reviewing and making findings related to the identity or cultural affiliation of cultural items or the return of such items and facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, and federal agencies or museum relating to the return of such items. We refer to these findings, recommendations and facilitation of disputes that do not involve culturally unidentifiable human remains simply as disputes; the Review Committee also makes recommendations regarding the disposition of culturally unidentifiable human remains. The NAGPRA Review Committee was established in 1991.

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[8]Pub. L. No. 92-203, 85 Stat. 688 (1971), *codified as amended at* 43 U.S.C. §§ 1601-1629h.

[9]The Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, Title I (1994); Tlingit and Haida Status Clarification Act, Pub. L. No. 103-454, Title II (1994).

[10]Op. Sol. Int. M-36975 (Jan. 11, 1993).

NMAI Act Requirements

The NMAI Act sections 11 and 13 generally require the Smithsonian to (1) inventory the Indian and Native Hawaiian human remains and funerary objects in its possession or control, (2) identify the origins of the Indian and Native Hawaiian human remains and funerary objects using the "best available scientific and historical documentation," and (3) upon request repatriate them to lineal descendants or culturally affiliated Indian tribes and Native Hawaiian organizations. As originally written, the act did not set a deadline for the completion of these tasks, but amendments in 1996 added a June 1, 1998, deadline for the completion of inventories.[11] The 1996 amendments also require the Smithsonian to prepare summaries for unassociated funerary objects, sacred objects, and objects of cultural patrimony by December 31, 1996.

The NMAI Act uses the same definitions as NAGPRA for unassociated funerary objects, sacred objects, and objects of cultural patrimony,[12] but the NMAI Act does not define human remains and it does not use the term associated funerary objects. Instead, the NMAI Act requires Indian funerary objects—which it defines as objects that, as part of the death rite or ceremony of a culture, are intentionally placed with individual human remains, either at the time of death or later—to be included in inventories and unassociated funerary objects to be included in summaries.

The Smithsonian has identified two museums that hold collections subject to the NMAI Act: the National Museum of the American Indian and the National Museum of Natural History. Final repatriation decisions for the American Indian Museum are made by its Board of Trustees and the Secretary of the Smithsonian has delegated responsibility for making final repatriation decisions for the Natural History Museum to the Smithsonian's Under Secretary for Science.

According to Smithsonian officials, when new collections are acquired, the Smithsonian assigns an identification number—referred to as a catalog number—to each item or set of items at the time of the acquisition or, in some cases, many years later. A single catalog number may include one or more human bones, bone fragments, or objects, and it may include the remains of one or more individuals. All of this information is stored in the

[11]National Museum of the American Indian Act Amendments of 1996, Pub. L. No. 104-278, 110 Stat. 3355 (1996). Unless noted otherwise, subsequent references in this report to the NMAI Act are references to the act as amended.

[12]20 U.S.C. § 80q-9a(a).

museums' electronic catalog system, which is partly based on historical paper card catalogs. Generally, each catalog number in the electronic catalog system includes basic information on the item or set of items, such as a brief description of the item, where the item was collected, and when it was taken into the museum's collection. Since the NMAI Act was enacted, the Smithsonian has identified approximately 19,780 catalog numbers that potentially include Indian human remains (about 19,150 within the Natural History Museum collections and about 630 within the American Indian Museum collections). Finally, like NAGPRA, the NMAI Act requires the establishment of a committee to monitor and review the inventory, identification, and return of Indian human remains and cultural objects. The Smithsonian Review Committee was established in 1990 for this purpose.[12]

After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with NAGPRA

As we reported in July 2010, federal agencies have not yet fully complied with all of the requirements of NAGPRA. Specifically, we found that while the eight key federal agencies generally prepared their summaries and inventories on time, they had not fully complied with other NAGPRA requirements. In addition, we found that while the NAGPRA Review Committee had conducted a number of activities to fulfill its responsibilities under NAGPRA, its recommendations have had mixed success. Furthermore, while National NAGPRA has taken several actions to implement the act's requirements, in some cases it has not effectively carried out its responsibilities. Finally, although the key agencies have repatriated many NAGPRA items, repatriation activity has generally not been tracked or reported governmentwide.

Key Federal Agencies Have Not Fully Complied with NAGPRA for Their Historical Collections

The eight key federal agencies we reviewed in our July 2010 report generally prepared their summaries and inventories by the statutory deadlines, but the amount of work put into identifying their NAGPRA items and the quality of the documents prepared varied widely. Of these eight agencies, the Corps, the Forest Service, and NPS did the most extensive work to identify their NAGPRA items, and therefore they had the highest confidence level that they had identified all of them and included them in the summaries and inventories that they prepared. In contrast,

[12]The Smithsonian refers to its Review Committee as the Repatriation Review Committee. In this statement, we will refer to it as the Smithsonian Review Committee to clearly differentiate it from the NAGPRA Review Committee.

relative to these agencies, we determined that BLM, BOR, and FWS were moderately successful in identifying their NAGPRA items and including them in their summaries and inventories, and BIA and TVA had done the least amount of work. As a result, these five agencies had less confidence that they had identified all of their NAGPRA items and included them in summaries and inventories. In addition, not all of the culturally affiliated human remains and associated funerary objects had been published in a *Federal Register* notice as required. For example, at the time of our report, BOR had culturally affiliated 76 human remains but had not published them in a *Federal Register* notice. All of the agencies acknowledged that they still have additional work to do and some had not fully complied with NAGPRA's requirement to publish notices of inventory completion for all of their culturally affiliated human remains and associated funerary objects in the *Federal Register*.

As a result of these findings, we recommended the agencies develop and provide to Congress a needs assessment listing specific actions, resources, and time needed to complete the inventories and summaries required by NAGPRA. We further recommended that the agencies develop a timetable for the expeditious publication in the *Federal Register* of notices of inventory completion for all remaining Native American human remains and associated funerary objects that have been culturally affiliated in inventories. The Departments of Agriculture and the Interior and TVA agreed with our recommendations. For example, Interior stated that this effort is under way in most of its bureaus and that it is committed to completing the process. It added that one of the greatest challenges to completing summaries and inventories of all NAGPRA items is locating collections and acquiring information from the facilities where the collections are stored.

The NAGPRA Review Committee Has Monitored Compliance with NAGPRA Implementation and Made Recommendations with Mixed Success

We found that the NAGPRA Review Committee, to fulfill its responsibilities under NAGPRA, had monitored federal agency and museum compliance, made recommendations to improve implementation, and assisted the Secretary in the development of regulations. As we reported, the committee's recommendations to facilitate the resolution of disposition requests involving culturally unidentifiable human remains have generally been implemented (52 of 61 requests has been fully implemented). In disposition requests, parties generally agreed in advance to their preferred manner of disposition and, in accordance with the regulations, came to the committee to complete the process and obtain a final recommendation from the Secretary. In contrast to the amicable nature of disposition requests, disputes are generally contentious, and we

found that the NAGPRA Review Committee's recommendations have had a low implementation rate. Specifically, of the 12 disputes that we reviewed, the committee's recommendations were fully implemented for 1 dispute, partially implemented in 3 others, not implemented for 5, and the status of 3 cases is unknown.

Moreover, we found that some actions recommended by the committee exceeded NAGPRA's scope, such as recommending repatriation of culturally unidentifiable human remains to non-federally recognized Indian groups. However, we found that the committee, National NAGPRA, and Interior officials had since taken steps to address this issue.

National NAGPRA Has, in Some Cases, Not Effectively Carried Out Its Responsibilities

We reported that National NAGPRA had taken several actions to help the Secretary carry out responsibilities under NAGPRA. For example, National NAGPRA had published federal agency and museum notices in the Federal Register; increasing this number in recent years, while reducing the backlog of notices awaiting publication. Furthermore, it had administered a NAGPRA grants program that from fiscal years 1994 through 2009 resulted in 628 grants awarded to Indian tribes, Native Hawaiian organizations, and museums totaling $33 million. It had also administered the nomination process for NAGPRA Review Committee members.

Overall, we found that most of the actions performed by National NAGPRA were consistent with the act, but we identified concerns with a few actions. Specifically, National NAGPRA had developed a list of Indian tribes for the purposes of carrying out NAGPRA, but at various points in the last 20 years the list had not been consistent with BIA's policy or an Interior Solicitor legal opinion analyzing the status of Alaska Native villages as Indian tribes. As a result, we recommended that National NAGPRA, in conjunction with Interior's Office of the Solicitor, reassess whether ANCSA corporations should be considered as eligible entities for the purposes of carrying out NAGPRA. Interior agreed with this recommendation and, after our report was issued, Interior's Office of the Solicitor issued a memorandum in March 2011 stating that NAGPRA clearly does not include Alaska regional and village corporations within its definition of Indian tribes and that the legislative history confirms that this was an intentional omission on the part of Congress. The memorandum also states that while the National NAGPRA Program's list of Indian tribes for purposes of NAGPRA must not include ANCSA regional and village corporations, National NAGPRA is currently bound by its regulatory definition of Indian tribe that contradicts the statutory definition by including ANCSA corporations. Because of this, the Solicitor suggests that

the regulatory definition be changed as soon as feasible, followed by a corresponding change in the list.

We also found that National NAGPRA did not always properly screen nominations for the NAGPRA Review Committee and, in 2004, 2005, and 2006, inappropriately recruited nominees for the committee, in one case recommending the nominee to the Secretary for appointment. As a result, we recommended that the Secretary of the Interior direct National NAGPRA to strictly adhere to the nomination process prescribed in the act and, working with Interior's Office of the Solicitor as appropriate, ensure that all NAGPRA Review Committee nominations are properly screened to confirm that the nominees and nominating entities meet statutory requirements. Interior agreed with this recommendation, stating that the committee nomination procedures were revised in 2008 to ensure full transparency and that it will ask the Solicitor's Office to review these procedures.

Repatriations Are Not Tracked or Reported Governmentwide, but According to Data Collected by GAO, Many NAGPRA Items Have Been Repatriated

In July 2010 we reported that while agencies are required to permanently document their repatriation activities, they are not required to compile and report that information to anyone. Of the federal agencies that have published notices of inventory completion, we determined that only three have tracked and compiled agencywide data on their repatriations—the Forest Service, NPS, and the Corps. These three agencies, however, along with other federal agencies that have published notices of inventory completion, do not regularly report comprehensive data on their repatriations to National NAGPRA, the NAGPRA Review Committee, or Congress. Through data provided by these three agencies, along with our survey of other federal agencies, we found that federal agencies had repatriated a total of 55 percent of human remains and 68 percent of associated funerary objects that had been published in notices of inventory completion as of September 30, 2009. Agency officials identified several reasons why some human remains and associated funerary objects had not been repatriated, including the lack of repatriation requests from culturally affiliated entities, repatriation requests from disputing parties, a lack of reburial sites, and a lack of financial resources to complete the repatriation. Federal agencies had also published 78 notices of intent to repatriate that covered 34,234 unassociated funerary objects, sacred objects, or objects of cultural patrimony.

Due to a lack of governmentwide reporting, we recommended the Secretaries of Agriculture, Defense, and the Interior and the Chief Executive Officer of the Tennessee Valley Authority direct their cultural

resource management programs to report their repatriation data to National NAGPRA on a regular basis, but no less than annually, for each notice of inventory completion they have or will publish. Furthermore, we recommended that National NAGPRA make this information readily available to Indian tribes and Native Hawaiian organizations and that the NAGPRA Review Committee publish the information in its annual report to Congress. The Departments of Agriculture and the Interior and TVA agreed with this recommendation, and Interior stated that its agencies will work toward completing an annual report beginning in 2011.

The Smithsonian Still Has Much Work to Do to Identify and Repatriate Indian Human Remains and Objects

In our May 2011 report we found that the Smithsonian Institution still had much work remaining with regard to the repatriation activities required by the NMAI Act. Specifically, we found that while the American Indian and Natural History Museums generally prepared summaries and inventories within the statutory deadlines the process that the Smithsonian relies on is lengthy and resource intensive. Consequently, after more than 2 decades, the museums have offered to repatriate the Indian human remains in only about one-third of the catalog numbers identified as possibly including such remains since the act was passed. In addition, we found that the Smithsonian established a Review Committee to meet the statutory requirements, but limited its oversight of repatriation activities. Finally, we found that while the Smithsonian has repatriated most of the human remains and many of the objects that it has offered for repatriation, it has no policy on how to address items that are culturally unidentifiable.

Since 1989, the Smithsonian Has Prepared Required Summaries and Inventories and Has Offered to Repatriate about One-Third of Its Indian Human Remains

We found that while the American Indian and Natural History Museums had generally prepared summaries and inventories within the deadlines established in the NMAI Act, their inventories and the process they used to prepare them have raised questions about their compliance with some of the act's statutory requirements. The first question was the extent to which the museums prepared their inventories in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, as required by the NMAI Act. Section 11 of the act directs the Secretary of the Smithsonian, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, to inventory the Indian human remains and funerary objects in the possession or control of the Smithsonian and, using the best available scientific and historical documentation, identify the origins of such remains and objects. However, the Smithsonian generally began the consultation process with Indian tribes after the inventories from both museums were distributed. The Smithsonian maintains that it is in full

compliance with the statutory requirements for preparing inventories and that section 11 does not require that consultation occur prior to the inventory being completed.

The second question is the extent to which the Natural History Museum's inventories—which were finalized after the 1996 amendments—identified geographic and cultural affiliations to the extent practicable based on available information held by the Smithsonian, as required by the amendments. The museum's inventories generally identified geographic and cultural affiliations only where such information was readily available in the museum's electronic catalog. However, the Smithsonian states that it does not interpret section 11 as necessarily requiring that the inventory and identification process to occur simultaneously, and therefore it has adopted a two-step process to fulfill section 11's requirements. The legislative history of the 1996 amendments provides little clear guidance concerning the meaning of section 11. However, we also found that the two-step process that the Smithsonian has adopted is a lengthy and resource-intensive one and that, at the pace that the Smithsonian is applying this process, it will take several more decades to complete this effort.

As a result of the identification and inventory process the Smithsonian is using, since the passage of the NMAI Act in 1989 through December 2010, the Smithsonian estimates that it has offered to repatriate approximately one-third of the estimated 19,780 catalog numbers identified as possibly including Indian human remains. The American Indian Museum had offered to repatriate human remains in about 40 percent (about 250) of its estimated 630 catalog numbers. The Natural History Museum had offered to repatriate human remains in about 25 percent (about 5,040) of its estimated 19,150 catalog numbers containing Indian human remains. In some cases, through this process, the Smithsonian did not offer to repatriate human remains and objects because it determined that they could not be culturally affiliated with a tribe. The congressional committee reports accompanying the 1989 act indicate that the Smithsonian estimated that the identification and inventory of Indian human remains as well as notification of affected tribes and return of the remains and funerary objects would take 5 years.[11] However, more than 21 years later, these efforts are still under way. In light of this slow progress, we suggested that Congress may wish to consider ways to expedite the

[11]H. Rep. No. 101-340(I), at 33 (1989); H. Rep. No. 101-340(II), at 42 (1989).

Smithsonian's repatriation process including, but not limited to, directing the Smithsonian to make cultural affiliation determinations as efficiently and effectively as possible.

The Smithsonian Review Committee's Oversight and Reporting Are Limited

In May 2011, we reported that the Smithsonian Review Committee had conducted numerous activities to implement the special committee provisions in the NMAI Act, but its oversight and reporting activities have been limited. For example, we found that contrary to the NMAI Act, the committee does not monitor and review the American Indian Museum's inventory, identification, and repatriation activities, although it does monitor and review the Natural History Museum's inventory, identification, and repatriation activities. Although the law does not limit the applicability of the Smithsonian Review Committee to the Natural History Museum, the Secretary established a committee to meet this requirement in 1990 that oversees only the Natural History Museum's repatriation activities and is housed within that museum. Although the Smithsonian believes Congress intended to limit the committee's jurisdiction to the Natural History Museum, the statutory language and its legislative history do not support that view. The Smithsonian provided several reasons to support this contention but, as we reported in May 2011, these reasons are unpersuasive. Therefore, we recommended that the Smithsonian's Board of Regents direct the Secretary of the Smithsonian to expand the Smithsonian Review Committee's jurisdiction to include the American Indian Museum, as required by the NMAI Act, to improve oversight of Smithsonian repatriation activities. With this expanded role for the committee, we further recommended that the Board of Regents and the Secretary should consider where the most appropriate location for the Smithsonian Review Committee should be within the Smithsonian's organizational structure. The Smithsonian agreed with this recommendation, stating that the advisory nature of the committee could be expanded to include consultation with the American Indian Museum.

In our May 2011 report, we also found that neither the Smithsonian nor the Smithsonian Review Committee submits reports to Congress on the progress of repatriation activities at the Smithsonian. Although section 12 of the NMAI Act requires the Secretary, at the conclusion of the work of the committee, to so certify by report to Congress, there is no annual reporting requirement similar to the one required for the NAGPRA Review Committee. As we stated earlier, in 1989, it was estimated that the Smithsonian Review Committee would conclude its work in about 5 years and cease to exist at the end of fiscal year 1995. Yet the committee's monitoring and review of repatriation activities at the Natural History

Museum has been ongoing since the committee was established in 1990. As a result, we recommended that the Board of Regents, through the Secretary, direct the Smithsonian Review Committee to report annually to Congress on the Smithsonian's implementation of its repatriation requirements in the NMAI Act. The Smithsonian agreed with this recommendation, stating that it will submit, on a voluntary basis, annual reports to Congress. The Smithsonian further stated that although the format and presentation are matters to be discussed internally, it intends to use the National NAGPRA report as a guide and framework for its discussion and report.

Finally, during our review of the Smithsonian Review Committee activities we determined that no independent administrative appeals process exists to challenge the Smithsonian's cultural affiliation and repatriation decisions, in the event of a dispute. As a result, we recommended that the Board of Regents establish an independent administrative appeals process for Indian tribes and Native Hawaiian organizations to appeal decisions to either the Board of Regents or another entity that can make binding decisions for the Smithsonian Institution to provide tribes with an opportunity to appeal cultural affiliation and repatriation decisions made by the Secretary and the American Indian Museum's Board of Trustees. The Smithsonian agreed with this recommendation, stating that it will review its dispute resolution procedures, with the understanding that the goal is to ensure that claimants have proper avenues to seek redress from Smithsonian repatriation decisions, including a process for the review of final management determinations.

Most Human Remains and Many Objects Offered for Repatriation Have Been Repatriated, but the Smithsonian Has No Policy on Culturally Unidentifiable Items

In May 2011 we reported that the Smithsonian estimates that, of the items it has offered for repatriation, as of December 31, 2010, it has repatriated about three-quarters (4,330 out of 5,980) of the Indian human remains, about half (90,550 out of 212,220) of the funerary objects, and nearly all (1,140 out of 1,240) sacred objects and objects of cultural patrimony. Some items have not been repatriated for a variety of reasons, including tribes' lack of resources, cultural beliefs, and tribal government issues.

In addition, we found that, in the inventory and identification process, the Smithsonian determined that some human remains and funerary objects were culturally unidentifiable. In some of those cases it did not offer to repatriate the items and it does not have a policy on how to undertake the ultimate disposition of such items. Specifically, our report found that according to Natural History Museum officials about 340 human remains and about 310 funerary objects are culturally unidentifiable. The NMAI Act

does not discuss how the Smithsonian should handle human remains and objects that cannot be culturally affiliated, and neither museum's repatriation policies describe how they will handle such items. In contrast, a recent NAGPRA regulation that took effect in May 2010 requires, among other things, federal agencies and museums to consult with federally recognized Indian tribes and Native Hawaiian organizations from whose tribal or aboriginal lands the remains were removed before offering to transfer control of the culturally unidentifiable human remains.[15] Although Smithsonian officials told us that the Smithsonian generally looks to NAGPRA and the NAGPRA regulations as a guide to its repatriation process, where appropriate, in a May 2010 letter commenting on the NAGPRA regulation on disposition of culturally unidentifiable remains, the Directors of the American Indian and Natural History Museums cited overall disagreement with the regulation, suggesting that it "favors speed and efficiency in making these dispositions at the expense of accuracy." Nevertheless, in our May 2011 report, we recommended that the Smithsonian's Board of Regents direct the Secretary and the American Indian Museum's Board of Trustees to develop policies for the Natural History and American Indian Museums for the handling of items in their collections that cannot be culturally affiliated to provide for a clear and transparent repatriation process. The Smithsonian agreed with this recommendation, stating that both the American Indian and Natural History Museums, in the interests of transparency, are committed to developing policies in this regard and that such policies will give guidance to Native communities and the public as to how the Smithsonian will handle and treat such remains.

In conclusion, Chairman Akaka, Vice Chairman Barrasso, and Members of the Committee, our two studies clearly show that while federal agencies and the Smithsonian have made progress in identifying and repatriating thousands of Indian human remains and objects, after 2 decades of effort, much work still remains to be done to address the goals of both NAGPRA and the NMAI Act. In this context, we believe that it is imperative for the agencies to implement our recommendations to ensure that the requirements of both acts are met and that the processes they employ to fulfill the requirements are both efficient and effective.

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[15]75 Fed. Reg. 12378 (Mar. 15, 2010). The final rule also allows museums and federal agencies to transfer control of funerary objects associated with culturally unidentifiable human remains and recommends that such transfers occur if not precluded by federal or state law.

June 16, 2011

GAO
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Highlights

Highlights of GAO-11-755T, a statement before the Committee on Indian Affairs, U.S. Senate

INDIAN ISSUES

Key Federal Agencies' and the Smithsonian Institution's Efforts to Identify and Repatriate Indian Human Remains and Objects

Why GAO Did This Study

The National Museum of the American Indian Act of 1989 (NMAI Act), as amended in 1996, generally requires the Smithsonian Institution to inventory and identify the origins of its Indian and Native Hawaiian human remains and objects placed with them (funerary objects) and repatriate them to culturally affiliated Indian tribes upon request. According to the Smithsonian, two of its museums—the American Indian and the Natural History Museums—have items that are subject to the NMAI Act. The Native American Graves Protection and Repatriation Act (NAGPRA), enacted in 1990, includes similar requirements for federal agencies and museums. The National NAGPRA office, within the Department of the Interior's National Park Service, facilitates the governmentwide implementation of NAGPRA. Each act requires the establishment of a committee to monitor and review repatriation activities.

GAO's testimony is based on its July 2010 report on NAGPRA implementation (GAO-10-768) and its May 2011 report on Smithsonian repatriation (GAO-11-516). The testimony focuses on the extent to which key federal agencies have complied with NAGPRA's requirements and the extent to which the Smithsonian has fulfilled its repatriation requirements.

The relevant agencies agreed with the recommendations in both reports and GAO is making no new recommendations at this time.

View GAO-11-755T or key components. For more information, contact Anu K. Mittal at (202) 512-3841 or mittala@gao.gov.

What GAO Found

GAO found that almost 20 years after NAGPRA was enacted, eight key federal agencies with significant historical collections—Interior's Bureau of Indian Affairs (BIA), Bureau of Land Management, Bureau of Reclamation, U.S. Fish and Wildlife Service and National Park Service; Agriculture's U.S. Forest Service; the U.S. Army Corps of Engineers; and the Tennessee Valley Authority—have not fully complied with the requirements of the act. All of the agencies acknowledged that they still have additional work to do and some have not fully complied with NAGPRA's requirement to publish notices of inventory completion for all of their culturally affiliated human remains and associated funerary objects in the *Federal Register*. In addition, GAO found two areas of concern with the National NAGPRA office's activities. First, National NAGPRA had developed a list of Indian tribes for the purposes of carrying out NAGPRA that was inconsistent with BIA's official list of federally recognized tribes and an Interior legal opinion. Second, National NAGPRA did not always screen nominations for NAGPRA Review Committee positions properly. GAO found that repatriations were generally not tracked or reported governmentwide. However, based on GAO's compilation of federal agencies' repatriation data, through September 30, 2009, federal agencies had repatriated 55 percent of the human remains and 58 percent of the associated funerary objects that had been published in notices of inventory completion.

With regard to the repatriation activities of the Smithsonian, GAO found that since the NMAI Act was enacted more than 21 years ago, the Smithsonian has offered to repatriate about 5,000 human remains, which account for approximately one-third of the total estimated human remains in its collections. GAO found that the Smithsonian has adopted a lengthy and resource-intensive inventory and identification process, which may account for the slow progress of repatriation at the museums. In some cases, through this process, the Smithsonian did not offer to repatriate human remains and objects because it determined that they could not be culturally affiliated with a tribe. GAO also found that the Smithsonian established a Repatriation Review Committee to monitor and review the repatriation activities of the Natural History Museum but not those of the American Indian Museum. Although the Smithsonian believes Congress intended to limit the committee's jurisdiction to the Natural History Museum, the statutory language and its legislative history do not support that view. GAO also found that neither the Smithsonian nor the review committee had provided regular information to Congress on the repatriation progress at the Smithsonian, and the Smithsonian had no independent administrative appeals process by which tribes could challenge a repatriation decision in the event of a dispute. Through December 31, 2010, the Smithsonian estimated that, of the items it had offered for repatriation, about three-quarters of the Indian human remains (4,330 out of 5,980) and about half of the funerary objects (89,550 out of 212,220) have been repatriated. In addition, the Smithsonian had not offered to repatriate approximately 340 human remains and 310 funerary objects it could not culturally affiliate, and it does not have a policy on the disposition of these items.

The CHAIRMAN. Thank you very much for your testimony.

Ms. Mittal, in your two reviews was there a demonstrated need for additional funding, greater technical assistance, or capacity building for tribes and native organizations to successfully participate in the repatriation process?

Ms. MITTAL. Funding was definitely an issue that we heard repeatedly both from the agency perspective, as well as from the tribal perspective, in terms of completing the process. The National NAGPRA Office does implement a grant program and since 1994 through 2009, we found that the office has made $33 million of grants available to both tribes and the museums.

Two-thirds of this money has actually gone to the tribes, but the amount of money requested by the tribes was more than double of that. The tribes actually requested over $52 million during that period of time, and less than half of their needs were met through those grants.

When we spoke to the tribal officials that had not repatriated items that were made available for repatriation, they identified the lack of funding for repatriation activities as one of their challenges. The number of grants made for repatriation activities is actually very small. Out of the $33 million, only $1 million has been made available for repatriation activities, which amounts to about six tribes a year getting about $50,000 from the National NAGPRA Office for repatriation activities.

The CHAIRMAN. Can you tell me whether there have been requests for funds for this?

Ms. MITTAL. There have been. Every year, there have been twice as many requests for funds as have been available.

The CHAIRMAN. In your reviews of both the Federal agencies and the Smithsonian, what mechanisms were in place regarding oversight and enforcement? Did you find these mechanisms to be effective?

Ms. MITTAL. Well, with regard to the NAGPRA, there are enforcement mechanisms in the Act. National NAGPRA does provide oversight. The Review Committee also provides oversight, but they do not have any tools or enforcement processes that they can use to enforce or encourage the Federal agencies to comply with the Act. So if they find that an agency is not complying with the Act, they really don't have a hammer or a stick to force them to comply.

On the Smithsonian side, what we found is that because the Smithsonian limited the Review Committee's oversight activities to the Natural History Museum, the American Indian Museum does not fall into the purview of the Review Committee. So in our opinion, we believe that the Review Committee's oversight responsibilities should be expanded to cover both museums.

The CHAIRMAN. Thank you. One of your key recommendations is that museums and agencies report on their progress annually to Congress. Can you describe the data you believe should be included in such a report?

Ms. MITTAL. Sure. What the agencies have to do when they make a repatriation is they have to permanently document that repatriation activity. But there is no requirement for them to compile that information or track it on an agency-wide basis. And they also do not provide that information to a central body like the National NAGPRA Office. So therefore, there is no easy or ready information available to Congress or the tribes about what the progress of repatriation has been by the agencies.

So we recommended that the agencies on an annual basis should provide this information to the National NAGPRA Office. The National NAGPRA Office should collate this information across the Federal Government and provide this information to the Review Committee and that information can then go to Congress.

At the Smithsonian, what we found is the Smithsonian has no reporting requirements to Congress, and so Congress has been re-

ceiving no information on an annual basis on the progress that the Smithsonian has made with regard to repatriation.

The CHAIRMAN. Well, thank you so much. This is important to us and we will certainly work on this. So I want to thank you very much.

Let me now ask Senator Murkowski for any questions she may have.

Senator MURKOWSKI. Thank you, Mr. Chairman.

Ms. Mittal, you mentioned some agencies do a better job in terms of meeting the requirements of NAGPRA. Can you identify who the better performers are and perhaps point out why they are doing a better job? We always look to best practices around here. What can we be learning from those that are actually doing what we had hoped?

Ms. MITTAL. Sure. We actually looked at the repatriation activities of eight agencies in detail, because these are the agencies that have very significant historical collections. And what we found was that the Forest Service, the Corps of Engineers, and the National Park Service were the three of the eight agencies that actually had performed the most activities to comply with NAGPRA.

The common features that we found in these three agencies versus the other five that had not done as much was the fact that they had centralized data, so they had better information on where their collections were and who held their collections. All of these collections are generally scattered at hundreds of repositories across the Country. So if an agency doesn't know where their collections are, they can't begin the process of identifying the items that are subject to NAGPRA.

These three agencies had much better information about where their collections were. These agencies also had very good processes about going about identifying the items and they also dedicated staff and resources to the effort. The other agencies did not do such a good job in all of those areas.

Senator MURKOWSKI. So resources, obviously, are always a factor out there. But it also goes back to how they collect the data and how that has been available. So we could be looking to these three agencies for some ideas in terms of how to translate those to the others.

Ms. MITTAL. Yes, I think so.

Mr. MALCOLM. And yes, if I may, a number of the agencies, of course, within Interior are very decentralized, but even with the Park Service, which is within Interior, they have a centralized office there that works with all of the sub-offices and units to track that information centrally. So you are correct, resources is one thing, but effective use of the resources you have is another. And having a centralized kind of process to track the use of those resources across the agency is a characteristic that all three of those have.

Senator MURKOWSKI. I appreciate that.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Murkowski.

Now, I would like to ask Senator Udall for any questions he may have, and to welcome him to the Committee to make any opening remarks.

STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

Senator UDALL. Thank you, Chairman Akaka, very much. And I would just like to put my opening remarks in the record and just follow up with a question or two here.

[The prepared statement of Senator Udall follows:]

PREPARED STATEMENT OF HON. TOM UDALL, U.S. SENATOR FROM NEW MEXICO

I would like to thank the Chairman for holding this important hearing. This is a serious issue and I hope that our Committee can help to improve the Native American Graves Protection and Repatriation Act, and implementation of the Act.

I thank the members of the panel for bringing their varying experience and perspective on the Act and look forward to hearing from each witness.

Sadly, the task of repatriation of Native American remains and other cultural objects is a huge task and takes the involvement of many partners, from federal agencies, to museums and research institutions, to the tribes who should house the remains of their ancestors and other culturally sensitive and sacred objects. I hope that this Committee can work with all of these partners to ensure that this process moves forward in the best possible way.

Senator UDALL. Following on Senator Murkowski's comment about best practices by the agencies, could you give us some examples in a quantitative way of the three agencies, what kinds of repatriations they have done and the numbers of collections returned, that kind of thing?

I know these are so important when they happen. There was a repatriation with the Jemez Pueblo that I remember. They had big trucks that loaded things from the East Coast and they drove all the way across America and came to the native sites that they had chosen to put everything into the ground, and huge turnout by the tribe and just a huge emotional feeling about doing that.

And so each of these that you are going to tell me about are an example of, I hope, where something like that happened and where we had a success.

Please go ahead.

Mr. MALCOLM. I will go over some of those numbers, but one thing to point out I think that is very important is that once the agency makes that cultural affiliation and determined who the items belonged to and could potentially be repatriated to, at that point, the ball kind of shifts to be in the tribe's court and the tribe has to initiate that action to come forward and say, yes, we are ready or we want those items returned. We have identified an appropriate burial place for them or other ways to care for those items and what not.

Senator UDALL. And that can take a long time, right?

Mr. MALCOLM. Correct.

Senator UDALL. Because many times the tribe isn't necessarily prepared.

Mr. MALCOLM. Correct.

Senator UDALL. And we shouldn't view that as a failure to not happen quickly. It is just the tribe has been put on notice and they are going out to try to figure out how they want to deal with this. And when they do, which is the ultimate act, then they receive the items and put them where they think is the best place in terms of their traditions.

Mr. MALCOLM. Correct. The example or the contrast I was going to make was the Forest Service, which is one of the agencies we have highlighted as being a good performer as far as NAGPRA compliance. Their percentage of repatriation on their human remains is only 15 percent, which on the surface is very low, but again, it is really the tribes. In that area, there have been some issues working out tribal things. So they still haven't reached an agreement on how to return those items, so they are in this kind of state where they are waiting for tribal agreement on how to participate in that.

So we have a number of examples. And of the three agencies that we have highlighted, for example the Corps of Engineers has repatriated 623 human remains, about 86 percent, and the National Park Service has repatriated 3,416 MNI, which is minimum number of individuals, how they count the human remains. And that is around 84 percent for them.

So the top agencies that we have identified, and these agencies track that information so they know what items have been repatriated and not, and they can provide information to the tribes on what items are still waiting for them to come forward and ask that they be returned.

Senator UDALL. Right.

Ms. MITTAL. I think the important thing to point out, though, is that none of the agencies have fully identified all of the NAGPRA items that are in their collections. What we do know is what they have offered for repatriation. We have some confidence in that number and we also have some confidence in the number of items that have been repatriated. But we do not have good information on what are the total number of items in any one of these collections.

Senator UDALL. Okay. Thank you very much. Thanks for your work on this.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you. Thank you very much, Senator Udall.

I want to thank you very much, Anu Mittal and Jeff Malcolm, for your responses here. It will certainly help the Committee with its work. And we will continue to look towards working together with you on this.

Thank you very much.

Ms. MITTAL. Thank you.

Mr. MALCOLM. Thank you.

The CHAIRMAN. I would like to invite the second panel to the witness table.

Serving on our second panel is Ms. Peggy O'Dell, the Deputy Director of the National Park Service at the Department of Interior. Also, she is accompanied by Mr. John Rever, the Director of the Office of Facilities, Environment and Cultural Resources at the Bureau of Indian Affairs.

Also, we have Mr. Kevin Gover, who is the Director of the National Museum of the American Indian located in Washington, D.C.

It is good to have all of you here. I want to welcome you to the Committee.

Ms. O'Dell, will you pleased proceed with your testimony.

STATEMENT OF PEGGY O'DELL, DEPUTY DIRECTOR, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY JOHN "JACK" REVER, DIRECTOR, OFFICE OF FACILITIES, ENVIRONMENT AND CULTURAL RESOURCES, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Ms. O'DELL. Thank you, Mr. Chairman and Senator Murkowski and Senator Udall. Thank you for the opportunity to appear before you today to present the Department of Interior's views on the implementation of the Native American Graves Protection and Repatriation Act. We appreciate your attention to the implementation of this important law.

If I may, Mr. Chairman, I would like to summarize my testimony and submit my entire statement for the record.

The CHAIRMAN. I appreciate that.

Ms. O'DELL. I am accompanied by John "Jack" Rever from the Bureau of Indian Affairs, who is available to assist with questions.

The Department of the Interior and several Federal agencies and museums that have NAGPRA obligations take their responsibilities seriously; 10,000 Native American human remains; 1 million funerary objects; and thousands of sacred objects and objects of cultural patrimony are reported to have been united with tribes and Native Hawaiian organizations.

The consultations between tribes and Federal agencies and museums which occur as part of the NAGPRA process have resulted in better relations between tribes and Federal agencies.

It must be recognized that fundamentally NAGPRA does not change ownership of items. Permits granted by Federal agencies confer access for the accumulation of data, but do not transfer ownership to the permit holder. NAGPRA provides a process to sort out possession and authority for control, which allows those with priority rights to direct use and disposition.

The administration of the law follows two tracks, that of Federal agencies and museums with NAGPRA obligations and that of the national NAGPRA Program which administers some of the Secretary of Interior's obligations for NAGPRA.

The National NAGPRA Program which is based in the National Park Service has responsibility for these eight activities, publishing inventory and repatriation notices for museums and Federal agencies indicating their decision to transfer control to tribes. We have reached almost 2,000 notices accounting for 42,000 Native American human remains, with 10,000 human remains repatriated.

Creating and maintaining databases, there are now seven web databases giving access and transparency to all NAGPRA compliance information. We make grants with museums, Indian tribes and Native Hawaiian organizations to consult on the determination of cultural affiliations and identification of cultural items, as well as the cost of repatriations.

From 1994 to 2010, 665 NAGPRA grants of nearly $38 million were awarded. And repatriation grant requests have increased 300 percent in the past two years.

We investigate civil penalty allegations and prepare assessments on penalties from museums that fail to comply with provisions of the Act. We have had 166 counts that have been investigated and

$50,000 in penalties that have been collected since the promulgation of regulations in 1997. We establish and provide staff support to the Native American Graves Protection and Repatriation Review Committee. We provide technical assistance when there are excavations of Native American human remains and cultural items on Federal and Indian lands. And to date, Federal agencies have reported 111 dispositions.

We draft and promulgate implementing regulations. The rule on disposition of culturally unidentifiable Native American remains became final in 2010. A rule on disposition of unclaimed human remains and funerary objects on Federal lands is under review at the Department of the Interior. And the complete review of the 1995 regulations is underway to resolve issues and aid compliance.

And finally, we provide technical assistance for the Review Committee and supporting law enforcement investigations of illegal trafficking.

In addition to administering the National NAGPRA Program, the National Park Service has responsibility for NAGPRA in national parks. Since 2005, the two programs have been fully separated in administration.

Federal agency and museum compliance with the NAGPRA process begins with consultation with tribes to establish inventories of Native American human remains, resulting in notices of inventory completion. This is a necessary first step to repatriation. In my prepared statement, you will see a complete list of those inventories in detail.

A recent report by GAO in 2010 reported on withdrawal notices, which are pre-publication drafts. Failure of a museum or a Federal agency to publish a notice following inventory halts the repatriation process. In 2004, there were over 300 drafts for which a museum or a Federal agency had not given the National NAGPRA Program permission to publish in the Federal Register.

In 2005, the National NAGPRA Program sent letters to the originators of all of those documents and asked them to move forward and today less than 20 of the aging drafts await publication. So we have made significant progress there.

There are concerns about the implementation of NAGPRA in the following two areas. In curation, there are issues of access and use of Native American human remains and cultural items that remain in museum and Federal agency collections. Research institutions holding those collections desire more time for study and tribes desire consultation on cultural affiliation prior to more study. Federal agencies are seeking to locate the extensive collections in non-Federal repositories in order to complete the NAGPRA compliance process.

And in reporting collections, the National NAGPRA Program does not audit any Federal agency or museum collections. It is up to each one of those entities to report its inventory. The GAO report requested that Federal agencies determine their need for time and resources to complete their NAGPRA compliance and to publish certain notices.

And finally, in my prepared remarks you will see the status of the five recommendations that GAO made in the National NAGPRA report and our responses to those recommendations.

That concludes my statement, Mr. Chairman. Jack and I will be available for questions.

[The prepared statement of Ms. O'Dell follows:]

PREPARED STATEMENT OF PEGGY O'DELL, DEPUTY DIRECTOR, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR; ACCOMPANIED BY JOHN "JACK" REVER, DIRECTOR, OFFICE OF FACILITIES, ENVIRONMENT AND CULTURAL RESOURCES, BUREAU OF INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, thank you for the opportunity to appear before you today to present the Department of the Interior's views on the implementation of the Native American Graves Protection and Repatriation Act. We appreciate your attention to the implementation of this important law.

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) provides a process for determining the rights of lineal descendants and Indian tribes and Native Hawaiian organizations to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony in the possession or control of Federal agencies and museums and for human remains or items excavated or discovered on Federal or tribal lands after November 16, 1990. These items are basic to the humanity and definition of tribes. Resolution of rights to long-separated items through NAGPRA provides a means to restore long-denied rights and cultural heritage to tribes and to Native Hawaiian organizations.

The Department of the Interior and the several Federal agencies and museums that have NAGPRA obligations take their responsibilities seriously. As a result of NAGPRA, 10,000 Native American human remains, one million funerary objects, and thousands of sacred objects and objects of cultural patrimony are reported to have been united with tribes and Native Hawaiian organizations. The consultations between tribes and Federal agencies and museums, which occur as part of the NAGPRA process, have resulted in better relations between tribes and Federal agencies and have added to the body of knowledge on museum collections.

It must be recognized that, fundamentally, NAGPRA does not change ownership of items. Rather, it asks to whom these items should rightfully belong, against a history in which Native American human remains and cultural items were removed without permission from descendants, and in which it was assumed that possession conferred ownership. NAGPRA provides a process to sort out possession and authority for control, which allows those with priority rights to direct use and disposition. As a result, permits granted by Federal agencies for scientific study on the land confer access to allow accumulation of data, but do not transfer ownership to the permit holder.

Administration of NAGPRA

The administration of the law follows two tracks: that of Federal agencies and museums with NAGPRA obligations, and that of the National NAGPRA Program, which administers some of the Secretary of the Interior's obligations for NAGPRA. The National NAGPRA Program, which is based in the National Park Service (NPS), has the responsibility for the following activities for the Secretary of the Interior:

- Publishing inventory and repatriation notices for museums and Federal agencies in the Federal Register, which indicate their decision to transfer control to tribes. These will shortly number 2,000 notices accounting for 42,000 Native American human remains, of which 10,000 have been repatriated to tribes and Native Hawaiian organizations, and over one million funerary and other cultural objects
- Creating and maintaining databases. The database of Culturally Unidentifiable Human Remains is now one of seven on the web maintained by the National NAGPRA Program to give access and transparency to all NAGPRA compliance information and assist in consultation and repatriation. Maps of tribal lands and other resources for consultation and repatriation are found on the National NAGPRA Program website at *www.nps.gov/NAGPRA*.
- Grant Making to assist museums, Indian tribes, and Native Hawaiian organizations in consulting on the determination of cultural affiliation and identification of cultural items, as well as for costs of repatriation when tribes bring ancestors and items home. From 1994–2010, 665 NAGPRA grants were awarded to museums and tribes, totaling nearly $38 million. Repatriation grant requests have increased 300 percent in the past two years.

- Investigating civil penalty allegations and preparing assessments of penalties on museums that fail to comply with provisions of the Act. Since the promulgation of the regulations in 1997, 166 counts have been investigated and $50,000 in penalties collected. Each museum found to not be in compliance has come into compliance by the end of the civil penalty process.
- Establishing and providing staff support to the Native American Graves Protection and Repatriation Review Committee, which resolves disputes and aids repatriation. Their report to Congress is a nationwide view of accomplishments and barriers.
- Providing technical assistance for prompt disposition when there are excavations of Native American human remains and cultural items on Federal and Indian lands. To date, Federal agencies have reported 111 dispositions, accounting for almost 1,000 human remains and 9,000 funerary objects.
- Drafting and promulgating implementing regulations. The rule on disposition of Culturally Unidentifiable Native American Human Remains became final in 2010; a rule on disposition of "unclaimed" human remains and funerary objects on Federal lands is under review at the Department of the Interior; and a complete review of the 1995 regulations is underway, to resolve issues and aid compliance.
- Providing technical assistance, through training, the web and reports for the Review Committee, as well as support for law enforcement investigations of illegal trafficking. Training is provided to upwards of 2,000 participants annually in in-person, webinar and video training. The National NAGPRA Program responds to thousands of inquiries annually.

In addition to administering the National NAGPRA Program, the National Park Service has responsibilities for NAGPRA in national parks. Since 2005, the two programs have been fully separate. At that time a consultative relationship between the Assistant Secretary of Fish and Wildlife and Parks and the Assistant Secretary of Indian Affairs was also established. The Office of the Solicitor, representing both agencies, consults on regulations and assists the National NAGPRA Program functions, including training.

Federal agency and museum compliance with the NAGPRA process begins with consultation with tribes to establish inventories of Native American human remains resulting in notices of inventory completion. This is a necessary first step to repatriation and works in conjunction with the distribution of collections summaries to tribes resulting in consultation and claims for cultural items resolved in notice of intent to repatriate notices. Dedication to the process is seen in the following:

- There have been 1,539 summaries and 459 statements that no NAGPRA collections summary was required submitted to the National NAGPRA Program from 770 museums and 286 Federal agency units. As a result, 531 notices of intent to repatriate have been published, accounting for 144,782 unassociated funerary objects, 4,321 sacred objects, 962 objects of cultural patrimony, 1,217 objects that are sacred and patrimony, and 292 undesignated items.
- There have been 1,119 inventories submitted to the National NAGPRA Program and 1,441 notices of inventory completion published, accounting for over 41,000 Native American human remains and 1 million funerary objects associated with them. All notices are on the web.
- Museums and Federal agencies prepare two inventories. One inventory lists those individuals for whom cultural affiliation can be determined. The list includes the decision of the museum or Federal agency. If information is lacking by which a determination can be made on a reasonable basis, the Native American individual is listed on the second list-the "inventory of culturally unidentifiable" (CUI) Native American human remains. A public access database of CUI was launched in fall 2005 by the National NAGPRA Program to assist in further consultation and identification. To date there are 125,671 individuals listed on the database and 939,385 funerary objects associated with those individuals. The number of CUI subsequently culturally identified to date is 5,544 and the number of CUI transferred by a disposition to a requesting tribe, without a cultural affiliation determination, is 3,960.

Withdrawal of Notices

In 2010, the Government Accountability Office (GAO) prepared a report on NAGPRA, which includes findings for the Bureau of Indian Affairs (BIA), the Bureau of Reclamation, the Bureau of Land Management, the Fish and Wildlife Service, the National Park Service, the Army Corps of Engineers, the U.S. Forest Service

and the Tennessee Valley Authority. It reported on withdrawal notices, which are pre-publication drafts. Failure of a museum or Federal agency to publish a notice following completion of an inventory halts the repatriation process. Compliance requires publication of a notice and not mere submission to the National NAGPRA Program of a draft document. In 2004, there were over 300 drafts, submitted between 1996 and 2004, for which the museum or Federal agency had not given the National NAGPRA Program permission to publish in the Federal Register.

In 2005, the National NAGPRA Program sent letters to the originators asking that they move forward on abandoned drafts, even if they withdrew them to complete consultation. The National NAGPRA Program tracks human remains listed in inventories, through resolution in a notice, and finally into transfer of control to tribes and Native Hawaiian Organizations. The National NAGPRA Program does not withdraw a notice, but facilitates the publication of notices. Less than 20 of the aging drafts await publication.

Barriers to Implementation and Current Issues in NAGPRA

Curation: There are issues of access and use of Native American human remains and cultural items that remain in museum and Federal agency collections. Research institutions holding collections desire more time for study and tribes desire consultation on cultural affiliation prior to more study. Federal agencies are seeking to locate the extent of collections in non-Federal repositories in order to complete the NAGPRA compliance process.

Reporting Collections: the National NAGPRA Program does not audit Federal agency or museum collections to determine that all Native American human remains and cultural items are listed on inventories or summaries. It is up to each Federal agency or museum to report its inventories. The GAO report requested that Federal agencies determine their need for time and resources to complete NAGPRA compliance and publish certain notices. Federal agencies hold one-fifth of NAGPRA items in collections, while museums hold four-fifths of all collections. Three-fourths of the total number of culturally affiliated individuals in Federal agency collections are represented in published notices of inventory completion.

NPS Response to 2010 GAO NAGPRA Report

The 2010 GAO report on NAGPRA made five recommendations:

Recommendation 1: Develop and provide to Congress a needs assessment listing specific actions, resources, and time needed to complete the inventories and summaries required by NAGPRA sections 5 and 6 for their historical collections.
Response: Federal agencies are compiling their needs assessments and timelines, which are due to Congress by June 30, 2011. These responses will be submitted by the deadline.

Recommendation 2: Develop and provide to Congress a timetable for the expeditious publication in the Federal Register of notices of inventory completion for all remaining Native American human remains and associated funerary objects that have been culturally affiliated in inventories.
Response: Federal agencies are compiling their timetables, which are due to Congress by June 30, 2011. These responses will be submitted by the deadline.

Recommendation 3: Reassess whether Alaska Native Claims Settlement Act (ANCSA) corporations should be considered as eligible entities for the purposes of carrying out NAGPRA given the Solicitor's opinion and BIA policy concerning the status of ANCSA corporations that has been completed.
Response: The Solicitor issued a memorandum on March 18, 2011 and the Department of the Interior will shortly publish an amendment to the NAGPRA regulations to delete the regulatory definition of "tribe" to be consistent with the statute, which does not include Alaska corporations as tribes.

Recommendations 4: Strictly adhere to the nomination process prescribed in the Act and, working with the Department of the Interior's Office of the Solicitor, as appropriate, ensure that all Review Committee nominations are properly screened to confirm that the nominees and nominating entities meet statutory requirements.
Response: The nomination process for NAGPRA Review Committee members was modified in 2008 and all selections from that time forward have followed the GAO recommendations.

Recommendation 5: Request that the Department of the Interior request Federal agencies to report their human remains actually repatriated to tribes to the National NAGPRA Program on an annual basis and that the National NAGPRA

Program report the information to the NAGPRA Review Committee for inclusion in their report to Congress.

Response: The National NAGPRA Program began reporting the numbers to the Review Committee at their fall meeting in 2010 and in each report since. The numbers of human remains repatriated from Federal agency and museum collections to tribes and Native Hawaiian organizations will appear in the Review Committee Report to Congress for 2010, to be finalized on June 22, 2011, and in each annual report in the future.

Mr. Chairman, that concludes my statement. I will be pleased to answer any questions that you may have.

The CHAIRMAN. Thank you very much for your testimony, and good to have you here.

Ms. O'DELL. Thank you.

The CHAIRMAN. Mr. Gover, will you please proceed with your testimony?

STATEMENT OF KEVIN GOVER, DIRECTOR, SMITHSONIAN INSTITUTION'S NATIONAL MUSEUM OF THE AMERICAN INDIAN

Mr. GOVER. Thank you, Mr. Chairman. Good afternoon to the Members of the Committee.

At the Smithsonian, our repatriation programs operate on a belief that it is important that we return these remains and objects to the correct community, to the correct tribe, and that the real objective of the Act is not really to expunge these materials from these collections, but rather to respond to the tribes in the way that they wish concerning the disposition of these remains.

And so that is to say the objective is to repatriate, and not to purge the collections. The objective is not simply to remove all human remains from museum collections, only those that have been requested and whose affiliation has been established.

And that is why we are required by the statute to review the best available scientific and historical documentation in making these decisions about the affiliation of particular remains with particular communities.

We do appreciate the work of the GAO and the patient and collegial way in which the review was conducted. We learned a great deal in the process and, as you have read, the GAO did as well. The report raises several issues. We began working on those internally at the Smithsonian on just how to resolve those issues.

We do want to note and say that it is gratifying that the tribes which the GAO contacted concerning the repatriation processes of the two museums at the Smithsonian with these sorts of collections expressed satisfaction with how the S.I. conducts its repatriation process.

We have tried to establish a process that is open, that is collegial, that is not adversarial. It is not a matter of us protecting our protections from these communities, but rather working together with these communities to find a resolution that is satisfactory to them and not to us.

So for us, this program is not just about removing objects. It is about the proper culturally sound care of these things that perhaps some could be repatriated, but for any variety of reasons have not. And so even if at the end of a process the tribe chooses not to have objects or remains returned to them, we want to continue to care

for those materials in the way that the tribe wishes for them to be cared for.

These collections came together at the end of the 19th century and early 20th century. And that was a time when anthropology really considered itself to be conducting a salvage operation in connection with Native American communities. The presumption was that these communities would not continue to exist and so it was important that science get out there, capture these materials and preserve them for posterity.

Well, it turns out these communities are still here and they don't seem to be going anywhere soon. And so Congress has addressed the issue in an appropriate way by saying to institutions like the Smithsonian which is, in the end, a federally sponsored institution, that we need to work with these tribes in order to arrange for a proper disposition of these materials. That is our objective.

And so while we are anxious to do this with all the expedition possible, what is of greatest interest to us, what is of greatest import to us and, we believe, to the tribes with which we work, is this ongoing relationship concerning the care of the materials that originate in these communities.

Again, upon request, we will continue to return those items that are subject to the statute. We may on occasion return even objects that are not subject to the statute because that is the nature of our relationship with these communities.

But what we don't want to do, and the portion of the GAO report that I personally at least, and I think most of us at the institution really struggle with, is the idea that we should dispose of these materials, in particular these human remains, without making our very best efforts to determine their origin. We think it is more important to see that they return to the correct communities than that they simply leave the collection.

There will come a point, of course, at which we have made our best efforts and determined that we simply will not be able to determine the origin of some of these remains. And so GAO is absolutely right to say we should have an open, publicly developed policy for dealing with those circumstances. And so to that end, we will be doing so expeditiously and working with the tribes to develop our response.

So I will stop there, Mr. Chairman, and would be grateful to answer questions.

Thank you.

[The prepared statement of Mr. Gover follows:]

PREPARED STATEMENT OF KEVIN GOVER, DIRECTOR, SMITHSONIAN INSTITUTION'S NATIONAL MUSEUM OF THE AMERICAN INDIAN

Mr. Chairman and members of the Committee, I am Kevin Gover, Director of the Smithsonian Institution's National Museum of the American Indian. I am here today on behalf of the Smithsonian Institution to share with you our record in implementing the repatriation provisions of the National Museum of the American Indian Act.

The Smithsonian Institution is home to two museums that possess collections of Native American materials. The National Museum of Natural History (NMNH) collections include collections of archaeological, ethnological, and physical anthropological materials. The National Museum of the American Indian (NMAI) holds archaeological and ethnological collections. The NMNH opened its doors in 1910. The NMAI was established by Congress in 1989 in the National Museum of the Amer-

ican Indian Act, and its Mall museum opened its doors in 2004. Both Smithsonian museums possess vast collections compiled largely in the 19th and early 20th centuries.

Collecting practices in those times were very different from our current collecting practices. Those old practices sometimes disregarded the values and sensibilities of the Native communities from which the materials originated. As a result, both collections contain materials that properly should reside in the Native communities from which they came. When Congress passed the NMAI Act in 1989, it directed the Smithsonian to undertake the repatriation of human remains and funerary objects. In 1996, Congress amended the NMAI Act to add sacred objects and objects of cultural patrimony to the materials to be repatriated when requested by a tribe or eligible individual.

The Smithsonian has assumed the responsibility with considerable energy. In just over twenty years, the Smithsonian has offered for repatriation nearly 6,000 human remains, over 212,000 funerary objects, and over 1200 sacred objects and objects of cultural patrimony. For a variety of reasons ranging from the cultural to the practical, not all of these offers were accepted. Because of the vastness of the collections of the two museums, moreover, many remains and objects that might be repatriated are still in the collections despite the aggressive repatriation programs of the two museums.

As you know, the General Accountability Office (GAO) has completed a review of the Smithsonian's repatriation activities. We appreciate the GAO's work and the manner in which it was conducted, and recognize that the report raises worthy issues for the consideration of this Committee and the Smithsonian leadership.

Perhaps the most important issue presented by the GAO report involves the tension between the statutory objective of promptly returning eligible materials to requesting tribes and individuals on the one hand, and the statutory objective of returning eligible materials to the correct claimants on the other. As noted in the report, the NMAI Act requires the Smithsonian to consider the best available historical and scientific documentation in making its repatriation decisions. This requirement imposes a higher burden of proof on Smithsonian museums than is contemplated under the Native American Graves Protection and Repatriation Act (NAGPRA). It is a requirement both burdensome and necessary. The Smithsonian is committed to the advancement and diffusion of knowledge. Knowledge is the product of thorough research and analysis. Such scholarship produces conclusions that are as accurate as practicable. In the context of our repatriation activities, this means that our decisions should correctly determine the cultural affiliation of human remains and objects to be repatriated.

Turning to the specific recommendations contained in the GAO report, we share the report's objective of maintaining an orderly, effective, and transparent program of repatriation. To this end, the Smithsonian will consider ways in which the role of Repatriation Review Committee could include some relationship with the repatriation program at the NMAI. Because, historically, the RRC has not been involved with the repatriation decisions rendered of the NMAI, the precise nature of the relationship will be the subject of further discussions with key stakeholders. The NMAI Board of Trustees brings the same scholarly credentials and cultural expertise to the task as the RRC. The NMAI Board of Trustees must by statute have a Native American majority; the Trustees collectively are knowledgeable of Native cultures and committed advocates of the preservation of Native culture. The Board plays the independent advocacy role that the Congress anticipated when it empowered the Board of Trustees with "sole authority" over the NMAI collections, subject to the general policies of the Smithsonian. Nonetheless, we recognize the benefit of working more closely with the Repatriation Review Committee and we are evaluating the most effective and efficient way to enable that.

We agree with the GAO that a system of periodic reporting to Congress on the progress of the Smithsonian's repatriation activities should be established. By virtue of the GAO's report, we recognize that Congress is indeed interested in the scope of repatriation on a national scale and the Institution will develop a reporting mechanism through which the Secretary of the Smithsonian can provide to Congress a complete picture of its robust and successful repatriation program.

The Smithsonian also agrees with the GAO that the process of appealing repatriation decisions by the two museums should be changed. We note, though, how rare it has been for repatriation decisions by the museums to be challenged. Indeed, in over twenty years, there have been only two cases in which a Smithsonian museum's decision was challenged. The collegial processes pursued by both museums and the roles played by the RRC and the NMAI Board of Trustees in the process have resulted, in the overwhelming majority of cases, in the acceptance of the museums' decisions by those who have requested repatriations.

In the interest of transparency and consistency, we are examining different procedures for appeals. We agree with the GAO that the decision maker on an appeal from a museum's decision should not have been involved in the museum's decision. We will consider different options and establish a new process that has these characteristics.

We agree with the GAO that the Smithsonian should adopt and publish policies for the handling of culturally unaffiliated items in the collections. We note that the Smithsonian's obligations with regard to such items are different from those established in NAGPRA. We believe, therefore, that our policies should not necessarily be the same as those established by the Interior Department for NAGPRA institutions, and that such policies should be developed by the NMAI and NMNH in consultation with tribal governments. We will embark on such a consultation process promptly.

Thank you for the opportunity to testify, Mr. Chairman. I would be happy to answer any questions the Committee may have.

The CHAIRMAN. Thank you very, very much, Mr. Gover, for your testimony and your spirit of working with the tribes.

Ms. O'Dell?

Ms. O'DELL. Yes, sir?

The CHAIRMAN. We will hear from tribal leaders today about the importance of consultation when it comes to repatriation. What is the department doing to ensure that tribes are consulted in the repatriation process? Is there room for improvement in these consultations?

Ms. O'DELL. I think consultation is reported to be the best tool that we have to be able to carry out the NAGPRA law. And we have created a transparent system of data. We have collected a lot of data and we have put all of that up on the website for anyone to access. And we use that as a way to communicate as best we can with tribes.

The tribes look at that data and they get an understanding of whether or not they have any remains or objects that might belong to them, and they begin the consultation process with us. We conduct a lot of training. One of the missions that we have in running the National NAGPRA Program is to conduct training for tribes, for museums and for Federal agencies to help them understand how best to go through the process of identifying where these remains belong and how best to repatriate them.

The CHAIRMAN. Well, that is great.

Throughout your testimony, Mr. Gover, you agree with many of the GAO recommendations. How will you prioritize and implement these recommendations? And can you provide the Committee with a timeline on when these recommendations may be fully implemented?

Mr. GOVER. I can't, not at this moment. But I think if you will give me the opportunity to go back and consult with the Natural History Museum and with the Secretary, we will provide that in writing. I think you will find that it will not be a long time; that there is some work we need to to internally, but these aren't enormous tasks. And we would be happy to provide a report on our progress very promptly.

The CHAIRMAN. Thank you very much for that. You can tell that we are trying to set a timeframe to get some of these things acted on, and that is our spirit. So we look forward to working with you.

Mr. GOVER. If you give me a deadline, Mr. Chairman, I will meet it.

The CHAIRMAN. Ms. O'Dell, in 2005, this Committee held a hearing on NAGPRA which focused on an amendment to the definition of Native American. Does the department have a position on this proposed amendment?

Ms. O'DELL. Does this have to do with Alaska Native Corporation, sir?

The CHAIRMAN. This has to do with the proposed amendments to redefine the definition of Native American in NAGPRA, which means, of or relating to a tribe, people, or culture that is indigenous to the United States.

Ms. O'DELL. I am sorry, sir, I haven't heard any recent discussion, but I will be happy to get back to you with that answer.

The CHAIRMAN. All right. Thank you very much. I am glad we are coming to the point where we are trying to get responses.

Ms. O'DELL. Absolutely.

The CHAIRMAN. And thank you very much for that.

So let me ask Senator Murkowski, I am going to call for a second round, so I will pass it on to her at this point in time.

Senator Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman.

Ms. O'Dell, what does it cost for an average repatriation? Is there an average?

Ms. O'DELL. I don't know that there is an average. The way repatriation, the way we fund them out of the National NAGPRA Program is that a tribe will make a request for a certain dollar amount for a repatriation. And so far I think we have been spending about $150,000 a year on that and we have never had to turn down a request from a tribe for a repatriation.

Senator MURKOWSKI. So you are saying that you have got enough money to grant out to tribes, anybody that is looking to go through this process, so that funding of it is not an issue.

Ms. O'DELL. I would say that it is probably circumstantial. And as more information becomes available and tribes are able to identify more of their remains to come home, that there may be a point in time where that may not be a true statement, but to this point, we have been able to grant the dollars that the tribes want.

Senator MURKOWSKI. So there is no backlog, to your knowledge, out there of anybody who has made a request who has not yet received the funding.

Ms. O'DELL. Not to my knowledge.

Senator MURKOWSKI. Okay. You are like the only entity that I have ever talked to that says that we have enough money for the program that we are currently engaged in. Don't tell anybody who is working through this budget issue and problem that you are doing okay.

Because I think it is an important aspect of this, and what I have been told is that it is a considerable financial undertaking to go through the repatriation process. And not only costly financially, or from a financial perspective, but the time involved and the individuals that are involved with making it happen.

I know that within the State of Alaska, and you mentioned in response to the Chairman, you mentioned is this about the Alaska Native corporations. One of the benefits that we have seen in the State of Alaska is our ANCs, our Alaska Native corporations, are

on a stronger financial footing than most of our Alaska Native village tribes and are in a better position to thereby invest their own funds in the NAGPRA mission out there.

In March, I was notified by the National Park Service that it intends to change their regulations in a way that would make ANC's ineligible to receive any NAGPRA grants and participate in the NAGPRA consultations. And it is this whole aspect of the consultation I think that is troubling as well.

But we were told that the reason for this change is that the NAGPRA statute, unlike probably a dozen or more other Federal Indian statutes, chooses to narrowly define the term Indian tribe in a way that does not include Alaska Native village and the regional corporations.

This is a pretty substantial change from the Interior Department's position in the past where they have included Alaska Native corporations as participants on an equal basis with other Indian tribes. And we recognize that ANCs are not tribal governments, but they are considered tribes for purposes of dozens of other Federal laws. Our ANCSA Board of Directors are made up exclusively of native people. ANCs were statutorily created by Congress to manage the land and the resources of tribal people.

And as I mentioned, ANCs have a greater capacity, most clearly, and the resources to reclaim the property, whether it is the cultural objects or the remains, and really the greatest capacity to reach the most native people.

So given how Alaska tribes clearly can benefit from the policy goals of NAGPRA in terms of the repatriation and all that comes with it, and the knowledge that ANCs are better able to get around the financial issues, why the change in policy?

Ms. O'DELL. It is based on the solicitor's opinion of reading the NAGPRA law and trying to make our regulations support that and be consistent with what the law says.

Senator MURKOWSKI. So would the department object if I were to offer legislation that expressly included Alaska Native corporations in the definition of Indian tribe under NAGPRA in order to clear up any confusion or issue that might remain?

Ms. O'DELL. I think that would help clarify things, ma'am.

Senator MURKOWSKI. And I am assuming by that statement that, yes, it would clarify things and that the department wouldn't have objection to Alaska Native corporations being eligible for the NAGPRA consultation and just being able to work within NAGPRA.

Ms. O'DELL. Correct. It is just a matter of being in concert with the law.

Senator MURKOWSKI. I appreciate that. We want to make sure that everybody is doing what we need to be doing.

Mr. Gover, I wanted to ask you one quick question. And this is as it relates to international museums. Within the Museum of American Indian, do we have agreements with other museums outside of this Country with regards to international repatriation that you are aware of?

Mr. GOVER. Senator Murkowski, we have no standing agreements with institutions in other countries. We have on occasion repatriated materials to other countries, working both through the

national governments there and with the local indigenous communities where we believe these materials originated. But we have no continuous standing agreements.

Senator MURKOWSKI. Is that something that other countries have? Because I know that we have, or I believe that we have ancestral remains and cultural items within collections in international museums outside of our borders. That is correct.

Mr. GOVER. We do. In fact, there are native materials and native human remains throughout the globe in different museums. I can say based on a conversation I had with the Australian ambassador a few months ago that Australia is pursuing a very aggressive program of attempting to repatriate all remains from Australia that are in museums outside Australia to be returned there. And that their policy will be upon request to return materials in Australian museums to other countries where they originate.

And so that is a national policy, but it is not embodied in treaty or agreement of any kind.

Senator MURKOWSKI. So it really would be collection by collection, where we would go to a specific museum and make that request for repatriation. Is that how it works?

Mr. GOVER. Yes, Senator, that is how it works.

Senator MURKOWSKI. All right. I thank you.

I thank you all, and I thank you, Mr. Chairman, for the hearing this afternoon. I won't be able to stay for the third panel, as I have another engagement, but it was important to be able to get some questions answered here today.

So thank you.

The CHAIRMAN. Well, thank you very, very much for being here with us, Senator Murkowski.

Mr. Gover, the NMAI Act, which specifically mentioned Native Hawaiian organizations, can you please discuss the significance of this inclusion in the Act and the Smithsonian's efforts to repatriate items to Native Hawaiian organizations?

Mr. GOVER. Yes, Mr. Chairman. Obviously, in the passage of the NMAI Act, Native Hawaiian peoples were dealt with in some very interesting ways, essentially as the equivalent of American Indians and the indigenous people of the Western Hemisphere. And so, for example, in the NMAI Act, the Smithsonian is just as it is expected to repatriate human remains, funerary objects, sacred objects to American Indian tribes, it is also expected to do to, it is directed to do so when it comes to materials from Hawaii.

And so I learned just this morning, because I thought you might be interested, that when the Act was passed in 1989, we had in the Smithsonian collections 180 individuals, the remains of 180 individuals and five funerary objects. And I am pleased to be able to report that all of those have been repatriated to Native Hawaiian communities.

Let me just say, if I may, Senator, when I was at the Interior Department not that long ago, it was the time when both Congress and the Administration were considering the status of Native Hawaiian people under Federal law. And as you know, we presented a report at the direction of Congress in which my agency participated. And again, speaking for myself, I just wanted to say that we are grateful for the work that you are doing on that issue now.

The CHAIRMAN. Well, let me comment on that and thank you so much for your interest and your involvement at that time, which was really the beginning of what we are trying to do and I appreciate it very much.

Ms. O'Dell, the 2010 GAO report stated that BIA, along with the Tennessee Valley Authority, had done the least amount of work to identify NAGPRA items and include them in their summaries and inventories. Since that report, what actions has BIA taken to address this issue?

Ms. O'DELL. All of the Federal agencies have been working very hard since the GAO report. And since I have Mr. Rever with me, I will let him address that question for the BIA, if that is all right with you, Sir?

The CHAIRMAN. Yes.

Mr. REVER. Thank you very much, Mr. Chairman, for allowing me the opportunity to address that issue.

It is true that in 2009, there were three vacancies on the staff for handling museum collections, and largely NAGPRA issues, two curators and one archaeologist. At that time, those positions had languished for some while and we had fallen behind in our attention to the NAGPRA Program.

At that time, and I point out on page 46 of the report, that GAO noted that the number of human remains published in notices was 464, with 443 repatriated, which indicates that it was not being ignored; that actually it was being taken when the remains were identified and the cultural affiliation made.

But since that time, those numbers have doubled. We have published notices of 828 NMIs and 194 of those have been repatriated. The other remaining 36 remain. They have been noticed. There have been none claimed from the tribes to repatriate for a variety of reasons, some of which have to do with cultural reasons and the coordination and consultation of multiple tribes.

Because if you look at the notices, what you find is a cultural affiliation with more than one tribe. And we are very pleased to report that working closely with the Park Service and with the tribes that are included in those notices, we have been able to effect a very high rate of repatriations because the tribes themselves have, in working with us, reconciled the difference between the cultural affiliations and who would take possession of the remains and treat them with respect and the proper circumstances.

And we are very pleased to be able to report that. We have made tremendous progress and achievement in this area. There are a ways to go. For instance, we know that we have 61 repositories of NAGPRA items. Now, those 61 are included across all of the lower 48 States, but there are 15 States that we have not inventoried. We have not made an effort to go out and look at the potential NAGPRA items that would be under our control, but in the possession of those agencies.

We don't have anything in our possession. Everything is outside the Federal agency BIA. However, those are the 15 least likely States where items may be. We do, though, because we are working very closely with the National Park Service. Whenever a museum identifies a cultural items that is subject to the NAGPRA provisions and they have not notified Indian Affairs, we are noti-

fied by the Park Service. And then we take action for joint publication notices and that sort of thing.

So we have made tremendous progress and we are very pleased to be able to report that to the Committee.

The CHAIRMAN. Thank you very much.

Mr. Gover, can you provide the Committee with a few examples of culturally unaffiliated items within the collections and describe how the Smithsonian's obligations with regard to these items differ from those established under NAGPRA?

Mr. GOVER. Sure. The issue is whether any given bone usually can be properly associated with a particular community or as having a particular origin. Sometimes, it will come to us, for example, what comes to mind is a case where we had some modified material where there were human vertebrae into which had been inserted quite post-mortem, this was not the cause of death, arrowheads into these vertebrae.

Well, there is really no particular evidence to indicate that they relate to a given tribe. We know the area that they are from, but we also know that the arrowheads are not necessarily from that region. So there are some very strange things in museum collections sometimes, and that is a good example.

Now, we do think we can put together enough evidence to deal with that particular situation, but first glance, there is no reason to associate such things, which were basically made for tourist sale, there is no reason to associate such things with any particular community. We will make every effort to do so.

The more common case is going to be where the record supporting a particular skeleton, for example, isn't adequate to tell us exactly where something came from. And so those particular remains may have been part of a much larger group that arrived at some museum well over a century ago and were simply inadequately documented.

Now, there because neither of the Smithsonian museums engage in any sort of destructive testing, we may never know exactly where these particular remains came from. And in reality, it can't even be estimated. We just may never know.

Finally, there are materials in the collections that have been, the phrase we use is culturally modified. And so you might find a particular garment or a necklace that includes a human bone or locks of human hair. And the question then becomes: Are we attempting to identify the owner of the necklace or the owner of the hair? And how do we make sure that is the same person?

And so those are the kinds of things that are going to continue to come up and we have not reached solutions. But that is why we do agree with GAO that we should be talking about that out in the open and really working with the tribes to try to develop a policy on how to deal with those.

The CHAIRMAN. Well, we really appreciate that. We look forward to that happening.

Ms. O'Dell, in 2009, the Nation's largest investigation of archaeological and cultural artifacts led to the arrest of nearly two dozen individuals. Many of these individuals desecrated American Indian burials and stole priceless artifacts. Were these individuals pros-

ecuted? Do we need tougher penalties for those who desecrate and steal from sacred sites?

Ms. O'DELL. I believe you are referring to the BLM case down in the Four Corners area, sir. And I believe the individuals were prosecuted, and BLM is in the process of consultation to repatriate all of those artifacts that were recovered in the seizure after the arrests.

The CHAIRMAN. Yes, well, thank you very much. We look forward to continuing to work with you and to try to get some information from you as well, as we continue our work here. And if we need to, we will legislate some things. If not, we will try to do it administratively. But we certainly want to resolve some of the concerns that the native peoples have had over all of these years.

So I thank you very much for being a part of this.

Ms. O'DELL. Thank you, Mr. Chairman. It is an honor to administer the program with you.

The CHAIRMAN. Thank you.

I would like to invite the third panel to the witness table. Serving on our third panel is the Honorable Mark Macarro, chairman of the Pechanga Band of Luiseño Indians from Temecula, California; the Honorable Mervin Wright, Vice Chairman of the Pyramid Lake Paiute Tribe from Nixon, Nevada; and Mr. Ted Isham, Cultural Preservation Manager and Tribal Historical Preservation Officer at the Muscogee Creek Nation located in Okmulgee, Oklahoma.

So I want to welcome all of you to this hearing.

Chairman Macarro, will you please proceed with your testimony?

STATEMENT OF HON. MARK MACARRO, CHAIRMAN, PECHANGA BAND OF LUISEÑO INDIANS

Mr. MACARRO. Mr. Chairman and Members of the Committee, [greeting in native language]. It is good to be here with all of you, and good afternoon. And it is an honor to be here to testify on this issue [phrase in native language].

First, a bit of background. The homeland of the Pechanga people is the Pechanga Indian Reservation located near Temecula, as you said. Our people have called the Temecula Valley home for more than 10,000 years. We are 60 miles due north of San Diego along Interstate 15.

Our people have named the Temecula Valley since time began as [phrase in naive language.] It might be why it is sometimes hard to pronounce, and we believe that the world was created in Temecula. That is where all life began.

In 1847, 18 treaties were negotiated in sequence with tribes throughout California, and the Treaty of Temecula was the 17th of those treaties. There was one more after us, the treaty I think of Santa Ysabel. In good faith, huge land cessions were made under these treaties involving ceding most of what we know as modern day Southern California in exchange for a permanent inviolable homeland and the provision of goods and services to improve health, education and welfare of my great-grandparents.

Shortly after ceding these huge tracts of land and within one month of arriving back in Washington, D.C., gold was discovered in the Hills of Julian, about 40 miles away. The timing was indeed

unfortunate for all of us Indians and tribes because the Senate, upon hearing of the gold, they chose not to ratify these 18 treaties.

And still, surprisingly enough, our land was taken from us. Most of the goods and services that were promised as well in our treaty never materialized and we remained, however, on our lands at that point in time, that legally they had begun to be dispossessed from us.

But there is more. Twenty-six years after that treaty-making, in 1873, sheep farmers laid claim to the land that we managed to hang on to for about 25 years. That is where our last aboriginal village stood. These sheep farmers obtained a Federal court decree of ejectment from a Federal court in San Francisco.

And on a summer day in 1875, after two years of fighting that decree of ejectment, a posse led by the Sheriff of San Diego County showed up and under gunpoint evicted my ancestors from their village. And in one swell swoop, 300 elders, women, children were loaded onto wagons with a few personal effects and just dumped in a dry wash two miles away. Their former homes, their orchards, their village, their crops, their gardens were destroyed, burned, and their livestock herds, which were numerous, were seized to pay for the court costs and the cost of the eviction.

On June 27th, 1882, and that anniversary is coming up here, President Chester Arthur signed the executive order that established the Pechanga Reservation, finally a homeland for my people.

Now, this timely oversight hearing follows the release of two GAO reports demonstrating that Federal agencies have in general failed to comply with NAGPRA. On behalf of the Pechanga, we greatly appreciate your time and interest in consideration of these issues. The Pechanga has been fortunate to create a Cultural Resources Department dedicated to the return and protection of our tribal ancestors and their cultural belongings. We have actively participated on hundreds of development projects that directly impact our invaluable and irreplaceable Luiseño cultural resources.

Despite these remarkable advances, the Luiseño people continue to confront daily threats to our ancestors, and it is for this reason I come to the Committee today urging you to strengthen NAGPRA 20 years after its passage.

The two primary issues I need to address are compliance failures and consultation failures. We go into great detail of these in our written testimony.

On compliance failures, the La Jolla ancestors example. Unfortunately, the University of California example illustrates several NAGPRA concerns. I refer you to our written testimony for the full facts. But briefly, the University of California San Diego has refused to repatriate the remains of ancestors to our Kumeyaay neighbors to the south, neighbors who are culturally affiliated. And they used science to deny oral tradition, tribal oral tradition, and further demanding evidence contrary to NAGPRA standards.

The matter demonstrates the following shortcomings with the law. One, NAGPRA allows the university to set its own standards for appointing decision-makers to address repatriation claims. The U.C. and its campuses have a poor record of including representatives from California's federally recognized tribes.

Unfortunately, we see that many of these NAGPRA review committees are stacked by the institution against tribal interests, thus assuring that our tribal ancestors and their belongings will never return home.

The lack of guidance, standards or best practices results in inconsistencies and ultimately wrongheaded decisions which contravene NAGPRA's mandate. These institutions are simply unable to self police themselves to follow the law correctly. There is enforcement that is needed.

Two, the U.C. interprets NAGPRA's definitions in a manner which forces tribes to provide evidence of cultural affiliation and proof of identity of cultural items beyond the law's evidentiary standards. The guidance in NAGPRA provides institutions with yet another way to avoid repatriating by concluding that items are not subject to the law or, as the U.S. example shows, using the new culturally identifiable rule to question the very Indian-ness of our ancestors found within our ancestral territories or by trying to invent competing claims where none existed before.

Certainly, Congress did not intend for these results. We urge the Committee to provide clear guidance concerning these local review committees and evidentiary thresholds, which uphold the letter and spirit of NAGPRA.

I am almost done.

Consultation failures, our written comments provide several situations. But let me just say this. The United States Marine Corps Base Camp Pendleton is only a few miles away from our reservation. It is squarely within the aboriginal territory of all Luiseño people. They are our most active Federal neighbor and they generally attempt to handle consultations responsibly.

However, we nonetheless still encounter NAGPRA compliance issues. For example, the base holds group consultations wherein several recognized and non-federally-recognized tribes are invited to participate in these consultations at the same time. This places us in a precarious position because Federal law requires the agency to consult on an individual government to government basis with federally recognized Indian tribes.

Two, to our dismay, federally assisted institutions have divulged, without tribal input or consultation, very sacred and significant Luiseño songs that were recorded by ethnographers decades ago on aluminum discs. We believe NAGPRA's definitions should be clarified to specifically reference objects of cultural patrimony that are non-physical tribal properties like tribal sacred recordings, as was the law's original intent. These recordings are sacred, they belong to no one else, and they are regarded as intellectual property.

So we urge the Committee to consider creating a consultation definition with protocols and best practices that ensure consistent and just application of the law. California has adopted a definition under its sacred sites protection law that includes a number of key provisions and components which we would like to see made part of NAGPRA, including requirements for parties to take into account tribal cultural values and work toward mutually accepted agreements.

Finally, we ask that you consider how the U.N. Declaration on the Rights of Indigenous Peoples would apply. And particularly I

would turn your attention to sections 11 and 12, paragraphs two in each one of those, the implications of these provisions on how we can all improve NAGPRA. These paragraphs urge the redress of wrongs. They set a new framework for looking at how indigenous peoples are dealt with in a positive and respectful and honorable way.

We believe that by using these principles and making changes to Federal laws like NAGPRA, perhaps also the 1989 NMAI Act, will empower sovereign Indian governments in the proper treatment and return of their ancestral remains and cultural items.

In conclusion, I specifically ask that this Committee's strongly consider our examples and our suggestions and move forward with recommendations and amendments to NAGPRA, its implementing regulations, and the new culturally unidentifiable rule, as well as issuing best practice guidance. In doing so, we believe that this Committee will further NAGPRA' initial intent and ensure that the wrongs committed against tribal peoples in the United States are righted.

Thank you.

[The prepared statement of Mr. Macarro follows:]

PREPARED STATEMENT OF HON. MARK MACARRO, CHAIRMAN, PECHANGA BAND OF LUISEÑO INDIANS

Good afternoon, Chairman Akaka and distinguished members of the Committee:

My name is Mark Macarro and I am Chairman of the Pechanga Band of Luiseño Indians, located in Southern California. On behalf of the Pechanga People and our ancestors, we thank you for the opportunity to participate in this oversight hearing on achieving the policy goals of the Native American Graves Protection and Repatriation Act (NAGPRA). The protection and proper treatment of our ancestors and their personal items is a responsibility the Pechanga People accepts with pride. Each day our Tribe faces the destruction of and desecration to our cultural resources, including human remains, and constant threats to our sacred and cultural places.

Our People have taken steps to proactively protect these vital components to our heritage, cultural worldview and self governance; however, existing federal (and state) laws simply do not always provide sufficient protection for the resources that are housed in museums and educational facilities, as well as those items which are subject to disturbance every day because of development, both on and off federal lands. It is this constant struggle that we endeavor to succeed in honor of our ancestors. We appreciate the opportunity to provide helpful examples and suggestions for the Committee's consideration on how we can strengthen NAGPRA to better assist all tribal peoples across the United States in their duty to care for their ancestors and cultural items.

I. Introduction: "Sacred is the Duty Trusted Unto our Care and With Honor We Rise to the Need"

For more than twenty years, the Pechanga Band of Luiseño Indians ("Pechanga Tribe" or "Tribe") has invested significant resources in our cultural resource protection program. I am proud to say that the result of our efforts include: a state of the art curatorial facility that meets federal standards and which includes both tribal and non-tribal curation staff; a full staff dedicated solely to the identification, preservation and protection of the Tribe's invaluable and irreplaceable resources both on and off reservation; and technological advancement, including a full-fledged GIS department housing our data and information concerning resources in the Tribe's traditional territory, which often times surpasses the information and technology of the agencies with management control over tribal resources. In the spirit of cooperation, and in the interest of our cultural resources, the Tribe is able to offer its resources and expertise to assist federal, state and local agencies in identifying and avoiding impacts to known resources and cultural sites as well as planning for impacts to areas with the potential for unknown resources. To further our duty to our ancestors, we have successfully developed and implemented a professional tribal monitoring program that allows us to have highly trained and skilled tribal rep-

resentatives work side by side with archaeologists to offer the highest protection to our ancestor's physical and cultural remains.

However, despite the opportunity to achieve these cultural protection milestones under NAGPRA and otherwise, the Pechanga People still face a constant struggle to reclaim, protect and preserve our ancestors and their cultural belongings. The legal framework available to us is insufficient and lacking in many areas. In too many situations NAGPRA and its counterparts do not go far enough to protect these resources, provisions are simply implemented incorrectly, and in some cases, ignored all together. We hope these comments and the examples we provide below will enable the Committee to see the real world challenges faced by the Pechanga Tribe today, as well as other tribal nations across the United States, and will encourage your Committee to take action to make NAGPRA work better for all Indian Peoples.

II. Issues, Real World Examples and Potential Solutions

To provide the Committee a solid understanding of the practical issues facing the Pechanga Tribe, and many other tribes in the Nation, with regard to NAGPRA, we provide several examples below. We hope the Committee will find these illustrations and accompanying suggestions helpful as the laws and policies are reviewed and changes contemplated.

a. Intentional Excavations and Inadvertent Discoveries

While the Pechanga Tribe has concerns about how NAGPRA is implemented for those remains and items in the possession of museums and educational facilities, we also face day to day issues with current and future disturbance of our ancestor's final resting places and cultural sites. NAGPRA, while focused heavily on the return of items to tribes, also provides for the treatment and disposition of remains and cultural items found on federal (and tribal) lands through intentional excavations and inadvertent discoveries. Below is an example of how we are confronted with the shortcomings of these provisions on a frequent basis as we work closely with one of our neighboring federal agencies.

Example: The Camp Pendleton Conundrum

The Marine Corps Base Camp Pendleton ("MCBCP" or "Base") is located within the Pechanga Tribe's traditional aboriginal territory. The Tribe works very closely with Base staff through consultation and tribal monitoring on permitted development projects that occur within the Base. The Tribe and the Base have programmatic agreements in place, as well as agreements that provide for tribal monitoring to address any cultural resources that are surveyed or uncovered. In addition, the Base has developed on its own a protocol for handling situations governed by NAGPRA and in recent months the Base has engaged the local tribes in reviewing and potentially revising the protocol. However, despite the existence of these types of agreements among Pechanga, MCBCP and other interested Tribes who may have cultural affiliation to the items which will or may be uncovered or excavated during a project, the items are often not returned promptly or handled expediently. Unfortunately, human remains and cultural items must still go through the lengthy, cumbersome and culturally insensitive process of "Custody" pursuant to 10.6 of the Part 10 Regulations (43 CFR 10.6), which process includes notice, a claims process and publication of the details of disposition of such items, before the final disposition and/or repatriation of the remains and/or items can be carried out.

When tribes and lineal descendents already accepted as the affiliated tribes are involved in a permitted project taking place on federal lands, deference should be given to the agreements between those parties. The Pechanga Tribe has been told by the MCBCP that even though we have agreements in place concerning treatment, disposition and repatriation of items subject to NAGPRA, the Base is not able to transfer custody of those items without going through the entire Custody and Notification process in NAGPRA as those items technically became part of federal collections. This process is both culturally inappropriate and offensive because of the requirement to publish the plans for proposed disposition in newspapers of general circulation and is time consuming, costly and repetitive. The Tribe has to wait months, sometimes much longer, before items are repatriated even though agreements to repatriate have already been reached between the federal agency and the Tribe.

Solution: Deference to Agreements

Since its passage, the consultation process under NAGPRA has resulted in, for the most part, a positive relationship between the Tribe and MCBCP, as well as other federal agencies. However, as is so often the case with legislative attempts to "right wrongs," the *application of the law* in a practical and real world manner often conflicts with how the law was originally conceived. The example above demonstrates

how the intent of NAGPRA was to not only return those remains and cultural items to their rightful peoples, but also to develop strong relationships among, in particular, federal agencies through the consultation and treatment provisions of the law. However, as we have discovered, that intent is hampered by the law itself because even when the Tribe and federal agency can reach an agreement, the return of items is slow and cumbersome, resulting in further disrespect to those remains and resources and affected tribal peoples.

To address this "conundrum" we propose that the Intentional Excavation and Inadvertent Discovery sections of NAGPRA be amended to include provisions giving deference to previously reached agreements concerning treatment and repatriation where all the relevant and appropriate parties are involved in a permitted project. This could be in the form of a written Plan of Action concerning the remains and items subject to NAGPRA or other agreements that address the pertinent issues. We believe that this will ensure that the final disposition of items happens in a more timely and respectful manner. In addition, such a provision will also aid in honoring the confidentiality issues important to tribes, including details concerning the resources' identity and disposition and in some cases, location.

Solution: A More Tribally Inclusive Approach

Because of the experiences of the Pechanga Tribe, we believe that the NAGPRA sections covering intentional archaeological investigations and inadvertent discoveries must encompass a more inclusive and broader approach to the treatment of the remains and cultural items still in their final resting places, yet facing potential or certain disturbance and destruction by future development activities.

For example, the processes outlined in NAGPRA itself and its implementing regulations should include actual government-to-government consultation concerning the excavations and the potential discoveries resulting from such proposed work. We understand that other federal laws are designed to cover such consultation, but they fall short because they ultimately only cover items and places that are determined to be "historic properties" or "significant" sites or have significance to archaeologists—classifications which are "terms of art" with respect to their governing law and which classification we note often conflicts with tribal world reviews regarding these resources. Many of the individual items that are excavated do not meet those narrow definitions and thus encompass a group of culturally significant items over which some agencies argue affiliated tribes have no control and no legal right to be included in the decisions concerning their final treatment and disposition.

Although NAGPRA is primarily concerned with the repatriation of existing collections housed at federally assisted institutions, it does contain sections concerning ground-disturbing activities on federal land and how such activities affect tribal sacred resources. NAGPRA is intended as a human rights law to address the return and tribal control over Indian Tribes' own cultural resources that have been taken away from tribes through human rights violations committed against tribal people, including inhumane treatment, grave desecration and the loss of land through force.

Presently a gap exists in federal law which can result in tribes' inability to control the destiny of their own cultural resources. Pechanga has worked on numerous projects where federal law has failed to protect the resources and further has failed to allow the Tribe's expert opinion to play a determining role in the ultimate disposition of the resources. In many cases, it is hard to state that the cultural finds were "inadvertent" when the Tribe told the agency that the project area held cultural significance to the Tribe even if it was not able to pinpoint the exact location or precise nature of the resources at the time of the project's environmental review. The Tribe's first preference for such resources is in situ preservation instead of excavation. Still today, twenty years after the passage of this human rights law, many of our places are written off as "non-significant" and the resources are destroyed or left as orphaned collections with cultural resource management firms or other curatorial institutions.

To address this problem, we believe NAGPRA should contain provisions specifically calling for tribal consultation and including a requirement of reaching treatment agreements that meet the satisfaction of the affiliated tribes. The law should also address the ability for tribes to set a preference that the sites and items themselves be avoided and stay protected and preserved so that the issue of repatriation never has to be reached. The present status of the law seems to still encourage excavation and arguably actually forecloses certain options for the affiliated tribes concerning final disposition of the items. For example, the sections are written to assume that items uncovered will be excavated and removed from the place from which they were found. Pechanga takes great steps in always seeking to preserve in place human remains and sacred items in addition to other cultural resources. Unless the law requires avoidance as the preferred alternative, we fear the contin-

ued destruction of our cultural resources will result. We believe that NAGPRA intended to right the wrongs of the past while also avoiding additional wrongs in the future. Protecting these resources *in situ* is the best way to achieve that morally correct goal.

As stated above, many of these individual items and sites are not covered under other federal (or state) laws so they are left with no protection or tribal input as to their disposition. We respectfully suggest that NAGPRA be expanded to provide deserving protections for sites subject to intentional excavation and inadvertent discovery on federal lands, which would include mandatory government-to-government consultation with encouraged outcomes, a preference for preservation and avoidance of cultural and sacred sites, and the deference to tribes to determine the significance and ultimate disposition of the sites and resources.

Solution: Defining Consultation

The issue of proper consultation is not a new concern expressed by tribal people vis-à-vis NAGPRA. In fact, speakers raised certain consultation issues during the 2009 House hearings on NAGPRA. The issue with proper consultation arises in many contexts under NAGPRA, including those situations identified above and below.

While we will not endeavor to provide an exact definition of consultation here, in our experience, certain key points regarding consultation should be included in such a definition. For example, in 2004, California adopted a definition of consultation under a traditional cultural places protection law (generally known as SB 18): Consultation "means the meaningful and timely process of seeking, discussing and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance." While not perfect, there are several key components to this definition that we believe provide guidance for both federal agencies and institutions subject to NAGPRA.

The Pechanga Tribe urges the Committee to consider creating a definition of "consultation" with input from both tribal governments and federal agencies. We are confident that this will ensure strong guidance for both parties and in turn, will serve to more effectively and efficiently meet the intent and requirements of NAGPRA.

Further, another component to this solution is developing consultation protocols and best practices that will assist federal agencies in meeting their consultation duties. While some agencies may have developed their own internal protocols, having a standard to meet will ensure that consultation is effective across the board and vary less from agency to agency. To borrow again from state law, the Governor's Office in California has developed consultation guidelines for local agencies to properly consult under SB 18 (noted above) and have made these readily available through training sessions and posting them on the state website. We are sure there are other workable examples available as well, but this is one potential resource the Committee could consider in advancing consultation protocols.

Example: Sacred to the Tribe, But Not NAGPRA

In addition to the above situation, it has been our experience with permitted projects on federal lands outside our reservation that the scope of items covered under the intentional excavation and inadvertent discoveries sections of NAGPRA is too narrow. Further, the definitions under NAGPRA are too constrained as they fail to account for some items that are sacred to tribes, yet do not meet the stringent, narrow definition in the law.

Shortly after NAGPRA was enacted, the Pechanga Tribe was involved in a reservoir project where a local water district was the lead agency and the project subject to NAGPRA. Although this area was known and accepted to be an area where tribal cultural sites and resources existed, not all of the areas were designated as significant sites or historic properties under the applicable laws. As such, many of the cultural items were not preserved and were instead excavated and removed from the property. When the Tribe attempted to repatriate the items, the water district refused to convey all the items to the Tribe, even though the items were all culturally related to one another. The district ultimately only turned over the items that it alone determined met the definitions set forth in the NAGPRA.

This poses several concerns for the Tribe. First, the definition and process leaves the determination of what falls under NAGPRA to agencies and employees who are not tribal members, who often do not have expertise in cultural resources issues and

who do not, and cannot, know the meaning, importance and sacred nature of such items to the tribes. NAGPRA certainly attempted to incorporate tribes in many ways; however, the real world experience of tribes under NAGPRA demonstrates that these measures can fall short of their mark. Tribal interpretation of their resources must be given deference over non-tribal interpretation.

Second, the definition of "Sacred objects" requires that these items have significance or function in the continued observance or renewal of such ceremony (25 USC §3001, Section 2(3)(C)). This threshold can be difficult to meet in California as the tribes in our state suffered some of the greatest genocidal efforts in North America at the hands of the federal and state governments and private citizens, which is further evidenced by the vast number of unrecognized tribes in the state. It is well documented that tribes were forbidden by laws, institutions and the larger community from practicing their religion or speaking their language for a significant length of time. As such, tribes are only in recent years in a position to revitalize their cultural practices and language, but sadly, many practices have been lost. This fact does not take away the significance and sacredness of items to the Tribe, however.

One example of items the Tribe knows to be housed in a curatorial facility that we consider "ceremonial" or culturally significant, yet which is not used today is known as fire rock. This rock is gathered from one specific location on the MCBCP property known as Tóotakut (TOWT-ah-coot) which translates from Luiseño into English as "rock fire." The resource is only derived from this single location and is unique because of its glowing quality. Although not everything is known at this time about this resource, what we do know through a combination of anthropological information as well as our place-name information is that it was important to the ancestors and utilized in a ceremonial nature. Because of its importance to the Tribe, we should be able to repatriate these items; however we are precluded from doing so because of the too narrow interpretation of "Sacred object" under NAGPRA.

A further concern of the Tribe is that there are a number of cultural items that are never afforded the opportunity to be repatriated because they do not fall within any of the five categories under the NAGPRA. Examples of such resources would be those items used on a day to day basis by our ancestors or items that may not have a presently known religious, sacred or ceremonial importance. However, it is the belief of the Pechanga People that they were once the cultural property of tribes and tribal individuals and thus, the tribes should be afforded the ability to repatriate these items and/or have a more prominent role in the determination of their ultimate disposition.

Further, because these items assist the Tribe in furthering its history and culture, we believe they are vital components to our People and deserve the same respect as those items which carry known religious and ceremonial significance. Additionally, this example demonstrates how what is "sacred" to one tribe varies and thus, it is possible there are over 560 tribal world views as to what is culturally important and which should be returned to tribes. As the law exists now, these items are left in both legal and spiritual limbo, which is neither the culturally or ethically appropriate result.

Solution: Broadening the Definitions

As this example demonstrates, there are several issues with the implementation of NAGPRA and how its definitions can be interpreted to prevent repatriation of certain items that we believe should be returned to tribes. One potential amendment we suggest is to provide guidance on how to determine what is "sacred," which for the reasons expressed above must include tribal input.

A second revision would include changes to the definition of "Sacred objects" to account for the historical atrocities and trauma suffered by the Nation's Indian Peoples, which has resulted in a disconnection between traditional uses and contemporary tribal peoples. We suggest revising the definition of sacred objects to include such objects that while may not be used in the present day for whatever reason can still be returned to the Tribes and treated properly. We encourage the Committee to work with tribal governments to expand this definition in a way that would accommodate this situation.

Finally, we suggest that the definition of "cultural items" be expanded to include cultural resources that are not covered by other definitions in NAGPRA. As we note above, it is the Pechanga Tribe's belief that items not currently covered by the law may still be important to the Tribe. These resources were the cultural property of their ancestors. The Tribe is able to learn more and revitalize components of their history and culture that have been diminished or lost because of historical pressures and circumstances through the return and study of these items. In fact, the resources expended by the Tribe in cultural resource protection efforts have directly benefited the Tribe in numerous ways: We have been able to expand our knowledge

of Luiseño language, history and cultural practices directly through the study and use of these objects and we continue to benefit by virtue of our efforts at ethnographic and other research. To deny the return of these items because they do not fit under a narrow interpretation of a definition contained in NAGPRA denies the tribes the right to protect and further their histories and cultural practices.

b. Avoiding Repatriation

Unfortunately, there is a clear example in California that highlights a plethora of issues with the implementation of NAGPRA. The problems confronting California Tribes implicates concerns for other tribes, including Pechanga, as the pressures for denying repatriation by large universities (and museums) are growing and we fear could be used for denial of future claims. In this example, there are issues with how the term "culturally affiliated" is being interpreted; how "culturally unidentifiable" is being used to avoid return of remains and cultural items; how science is valued more than tribal knowledge by faculty reviewers; how the make-up of state and campus NAGPRA review committees works to deny rightful repatriation claims by tribes; the lack of accountability for the often deplorable treatment of ancestral remains and associated cultural items by museums and institutions; and the absence of standard practices regarding such treatment and chain of custody issues.

Example: The Case of the La Jolla Ancestors

The repatriation of the ancestral human remains dug up from the University of California, San Diego (UCSD) campus in the mid-1970s in an archaeological excavation is an ongoing concern being actively pursued by the Kumeyaay Nation of San Diego County, California. Pechanga supports those efforts. The handling and treatment of those remains by archaeologists, scientists, museums and the University of California across 40 years, demonstrates many of the problems with how NAGPRA is being implemented today. Meanwhile, the University of California system continues to hold the remains and grave goods of many tribal ancestors, including those of the Luiseño People. This must change.

In brief summary, the Kumeyaay made a claim for these ancestors many years ago: first by the Viejas Band of the Kumeyaay Nation around 1996 and then subsequently by the Kumeyaay Cultural Repatriation Committee (KCRC) around 2006. The mission of the KCRC is to protect and preserve ancestral remains, sacred lands, sacred objects and funerary objects under NAGPRA for today and future generations. KCRC is unique in that it is comprised of 12 Kumeyaay tribes of San Diego County: Barona, Campo, Cuyapaipe, Inja-Cosmit, Jamul, La Posta, Manzanita, Mesa Grande, San Pasqual, Santa Ysabel, Sycuan, and Viejas, all working together cooperatively to achieve their goal of repatriation.

Initially, UCSD denied they even had collections that may be subject to NAGPRA. Finally, in or around 2006, the campus realized that it did in fact have possession of collections subject to NAGPRA, although it was not necessarily clear where they were located, due to the remains' undocumented chain of custody. The journey of those remains from their final resting place to labs, museums and the Smithsonian, then back across the country to California—some in a Staples box, others in a Chicken Breast strip fritters box, clearly having not been properly curated, with some shellacked, others falling out of their un-bagged wrappings, others with fresh breaks and glued pieces—demonstrated a failure to handle these human beings and their belongings in a culturally appropriate manner, and which was unacceptable and disgraceful.

Following the most recent claim by KCRC, UCSD convened a campus NAGPRA Working Group around 2007, not having appointed one before. As a result of this unfamiliarity and no guidelines to fall back upon, ultimately this Working Group, which exists today with the same composition, lacked balance: The Committee Chair is married to the scientist who originally dug up the graves and another scientist who participated in the original dig also sits on the Committee. No Committee members have specialized expertise in the burial or other cultural practices of the Kumeyaay; nor are there any tribal representatives, despite that request having been made by the Kumeyaay.

Not surprisingly, that Working Group, stacked against repatriation of these ancestors from the start, issued a majority report in which they found that cultural affiliation could not be established, essentially because the remains, dating to approximately 9,500 years old, were "too old" to establish such affiliation in their view. However, as the Group's minority report pointed out, this finding ignored the many lines of evidence that did support a finding of cultural affiliation, which evidence was accepted by a different UC campus in 2001 regarding other Kumeyaay claims from the same general area.

Unfortunately, the UC system is set up such that campus recommendations flow to a system-wide NAGPRA Committee comprised of one appointee from each of the campuses with collections subject to the law. It should be noted that two Native Americans may be appointed to this committee by the UC Office of the President from nominations made by campuses. When the La Jolla remains were considered by this system-wide committee in 2011 for repatriation under the new CUI rule, one tribal member was from a non-federally recognized California tribe and the other from a federally-recognized tribe outside of California. Again, missing was the direct world-view and strong political voice of knowledgeable, federally-recognized California, tribes. This begs the question of why the committee did not seek to include members of federally recognized tribes in California and further, whether they made any attempt to do so.

While the recommendations from this Committee were split, the notes from that meeting show that scientists, both within and external to the committee, were trying to put up new obstacles to the repatriation of these ancestors. These individuals were changing their arguments from "they are too old" to be Kumeyaay to "they are too old to be Native American." However, by its own actions, UCSD has treated the human remains as Native American: UCSD submitted the human remains in its NAGPRA inventory in 2008, submitted that inventory to the UCSD NAGPRA Working Group, had several interactions with the NAGPRA Designated Federal Officer and met with the Kumeyaay, all demonstrating that UCSD continued to treat the remains as Native American. We understand no new evidence to the contrary was provided to the committee.

It should also be noted that the UCSD property where the remains were excavated was designated a sanctified cemetery by the state Native American Heritage Commission in 2008 and listed on the National Register of Historic Places under Criterion D (archaeology) in 2008 and Criterion A (tribal values) in 2009. Moreover, subsequent research performed on the remains by a qualified researcher of native descent published in 2010, found evidence in the female ancestor of a tooth with prominent shoveling, a physical trait still present in modern day Native American populations. Further, KCRC has been recognized as the Most Likely Descendant under California state law to repatriate more recent bone found at the same UCSD site. The system-wide committee's meeting notes do not indicate that it considered any of that information when debating whether the remains should be repatriated. Unfortunately, this situation raises more questions than answers. How much more demonstration of cultural linkage can a tribe provide? What is a reasonable effort to make a tribe demonstrate its cultural affiliation? How do we balance the "requirements" of science and the view of tribal peoples to come to a fair and just result? We hope that going forward, this Committee can assist us with finding clear and workable answers to these and many other questions raised by our testimony.

Other arguments from scientists on the system-wide committee were that tribes from outside the Kumeyaay aboriginal territory may want to claim these so-called CUI remains. This argument was advanced even though the Kumeyaay territory was recognized by the State of California in 2002 via Assembly Joint Resolution 60, which proclaimed the territory stretched from the Pacific Ocean into the desert and down into Baja California, including the property at issue, and even though no other tribe has stepped forward over all these years to make such a claim. Why was there so much focus by elements of the committee on cultural affiliation when the remains were being considered for repatriation under the CUI rule? Again, this example raises concerns with NAGPRA itself and the new CUI rule as well.

Just in the last month, the UC Office of the President, upon review of the system-wide committee's decision, appropriately deferred to the campus' determination regarding the remains' Native American origin and authorized UCSD to continue to proceed under NAGPRA. If the campus elects to continue to follow NAGPRA, the UC President further listed certain "directions" and "recommendations" for how UCSD should accomplish this.

The first item is for some "expert" to reanalyze whether the items found in the dig and listed on the draft inventory are really funerary objects (the Kumeyaay have consistently said they are). This perhaps illustrates the concern the Native American Rights Fund and others have expressed to the NPS during review of the CUI rule regarding the section that potentially allows for the the separation of grave goods from human remains.

The UC President's second recommendation is for the campus to revise its NAGPRA notice of inventory completion to acknowledge that given the old age of these remains, there is some division among "experts" on whether they meet the legal definition of Native American. That this would even be proposed in handling the repatriation under the CUI rule indicates the need for a technical fix to the NAGPRA definition of "Native American" so that tribes can be assured that sci-

entists will not try and get a "second bite" at blocking repatriation—first denying cultural affiliation, then denying their "Indian-ness" at all—presumably so that these ancestors can continue to be treated as scientific property against the express legislative intent of NAGPRA and the expressed desires of tribal communities.

The third and fourth recommendations by the UC President appear linked: if UCSD elects to consult more broadly with tribes outside of the aboriginal territory of the Kumeyaay, as suggested by scientists on the system-wide committee, AND if additional tribes are determined aboriginal to the La Jolla area, then UCSD would need to revise its inventory and provide additional notices. If there are no competing claims, then the campus would be authorized to dispose of them to the Kumeyaay. This recommendation, stemming from elements of the state-wide Working Group, to essentially re-open consultation seems to be from the old-school playbook of trying to divide Indians in the hope that they may fight amongst themselves and therefore make no progress either as individual tribes or collectively. Again, this is the same theme we see in our earlier and later examples with permitted projects and consultation wherein too much process aimed at putting the burden on tribes thwarts the spirit and intent of the NAGPRA.

Meanwhile, it appears that the UC scientists, still unhappy about the original NAGPRA statute and its preponderance of the evidence standard, and perhaps even unhappier regarding the CUI rule, are taking their concerns to the media in a manner most offensive to tribal peoples: labeling tribal claimants as "lobbyists," calling their religious beliefs "myths" and going as far as to say that in trying to repatriate these ancestors, "the University of California favors the ideology of a local American Indian group over the legitimacy of science." They attack UC administrators who appear to be making legitimate efforts to finally repatriate the remains and grave goods under the new rule, including one administrator who was recently awarded the National Medal of Science by President Obama, in prominent publications such as Science. They essentially assert that the only legitimate way to place a claim under NAGPRA is by biological evidence, meaning, submitting the ancestor and the claimant to DNA analysis, what to them appears to be the only form of acceptable proof, of "scientific certainty"—a standard that was expressly rejected in the promulgation NAGPRA. Efforts to avoid repatriation have gotten out of control in California and we urge the Committee to help ensure that such efforts stop.

The degree of resistance to repatriation in some parts of the UC system is high, as demonstrated by the vocal opposition by certain faculty, many of whom have documented personal and professional conflicts of interest, but this only proves what tribes already knew: the need for a strong NAGPRA continues to be great. The need to make technical revisions to NAGPRA at its twenty year anniversary, to ensure that its original intent is being implemented in the field, also appears necessary.

Solutions: Clarifications, Revisions and Adopting New Provisions

To fix the issues outlined in the testimony and examples above, we respectfully recommend your Committee discuss the following improvements to NAGPRA and its implementation:

Clarifying "Native American" under NAGPRA: Making a technical amendment to the definition of "Native American" in NAGPRA, such as the "or was" fix (""Native American" means of, or relating to, a tribe, people, or culture, that is or was indigenous to any geographic area that is now located within the boundaries of the United States") so that the letter of the law and spirit of NAGPRA regarding cultural affiliation can be more fully achieved.

Amend Culturally Unidentifiable Rule: Revision of section 10.11(c)(4) of the 2010 NAGPRA CUI final rule that may allow for the separation of burial goods from human remains thereby allowing the holding repositories to keep these objects as their property. To allow these items to be separated from the ancestral remains is a spiritual violation of the highest order and should not be allowed.

Adopting Best Practices for Review Committees: The review of best practices for the population and operation of state and institutional NAGPRA review committees: If such formal committees are warranted, mandate parity and accommodation of the world view of knowledgeable tribal people, and meaningful penalties, such as the retraction of federal funding if the institutions are out of compliance. It is likely these committees are going to be in the spotlight more and more given the new CUI rule and that little guidance currently exists. This oversight hearing is an excellent opportunity to begin considering how we can strengthen NAGPRA and revise the CUI rule as needed.

In addition, mandatory inclusion of Native Americans on these review committees should be explored. Preferably, these should include a tribal person from a tribe located in the region of the claimant tribe when possible. This will en-

sure that the tribal world view is given parity with that of the scientific perspective. We urge the Committee to consider adopting such requirements as part of the best practices for these review committees.

Protection of Tribal Sacred Places: As has been discussed so often, we encourage the Committee to consider the possibility of Congress creating a cause of action to protect tribal sacred places, many of those which include items and places of cultural patrimony (such as Origin Areas), burials, grave goods and ceremonial items. Unless tribes can sustain lawsuits, it is unlikely that they can achieve a truly meaningful seat at federal, state and local negotiation tables. Moreover, if tribes are unable to save sites in the field, it only furthers the cycle of wrongs leading to laws like NAGPRA and creates additional repatriation issues, as discussed above.

Adopting Treatment Standards and Accountability Provisions: This example, and the others we touched on above, demonstrates the often deplorable conditions in which our tribal ancestors are kept by some Universities and curatorial facilities. Our ancestors deserve to be treated respectfully and with dignity until they are returned to their rightful tribal groups and laid to final rest once again. In addition to the best practice standards identified for the review committees, we urge the Committee to also consider adopting standards for the treatment of remains and cultural items still in the possession of these institutions, in consultation with tribes and other affected parties.

c. Cultural Patrimony

Objects of cultural patrimony, which NAGPRA defines as objects that have "ongoing historical, traditional, or cultural importance central to" tribal groups is another area of the law which we urge the Committee to review. As the example below demonstrates, what should be considered cultural patrimony is changing as technology advances.

Example: The Collision of Law and Intellectual Property

Recently the Pechanga Tribe became aware that Luiseño traditional tribal songs held in a collection at the National Anthropology Archives Holding ("NAA"), an arm of the Smithsonian, were going to be digitized and made available to the public in this format. These songs were originally recorded as part of a project organized by the American Bureau of Ethnology wherein a federal government agency employed various anthropologists and ethnologists, including John P. Harrington (which focused on southern California) to document and record aspects of tribal culture throughout the United States. Pechanga did not learn of this action to digitize its ceremonial songs through an official communication by the federal institution. While the Tribe appreciates the transition and updating of certain data to current technological preferences, digitizing these songs without proper processes in place regarding the confidentiality and use of the songs violates the sanctity of tribal cultural property.

Eventually, Pechanga was asked regarding our preferences for the treatment of these important resources by the NAA, but only because the Tribe proactively sent in written correspondence regarding our concerns. It was conveyed to the NAA that the Tribe's position is that none of the songs should be digitized or distributed to the public because they concerned death and burial, but in particular there were three (3) songs that were highly private in nature because they concerned very sacred practices. Ultimately, the NAA decided to go ahead and digitize all of the songs into an MP3 format except those three (3) that we identified as being particularly sensitive—a result the Tribe considers to fall short of culturally appropriate treatment for these items of Cultural Patrimony.

This is not a situation that is or will be unique to Pechanga. The project conducted by the American Bureau of Ethnology focused on tribes in various areas of North America and there are recordings concerning the culture of various tribes throughout the country in the holdings and presently available on the website database or through a public records request. It is our understanding that many tribal songs are available in a digital MP3 format, which can either be readily downloaded from a website or which can be sent to a requesting party for a fee. To our knowledge all of these actions were taken without appropriate consultation with the tribes to which this cultural property belongs.

Solution: Contemporizing the Law

This situation exemplifies the necessity to clarify the current law with regard to "Items of Cultural Patrimony" as defined in NAGPRA to include not only physical objects, but also intellectual property like that described above. This is a critical point, as it often is the case that it is the song, belief or use of the item itself, and

not necessarily its tangibility, that makes the object sacred. In addition, in the case of the Pechanga example, it seems as though these songs may not only be Items of Cultural Patrimony, but also Associated Funerary Objects. Thorough government-to-government consultation concerning the nature of such intellectual property and repatriation of such items should be required under NAGPRA. When these songs were recorded by professional such as Harrington it was never the intent of the informants that they would be widely distributed for unknown uses. Many of these pieces of cultural property were held in private collections and only inadvertently were transferred to these public federal institutions subjecting them to categorization as public property. This is another serious gap in the law concerning tribal authority over their cultural properties and must be remedied as technology is quickly changing and these private and very culturally sensitive items are now more at risk of abuse and confidentiality violations.

d. Complaint Process and Resources Issues

While the Pechanga Tribe has not itself faced issues with the complaint process and how it is implemented, we are aware that there are simply too few resources to adequately address complaints coming before the National Review Committee. This is particularly daunting when we consider the kinds of cases that the Committee may be reviewing. Using the La Jolla example above under item (b), it is clear that these cases are very complex, with large amounts of documentation and varying forms of evidence. We understand that there is only one person to review all complaints regarding NAGPRA violations and that there is currently a backlog of such complaints. We respectfully suggest that the Committee seek information on how many complaints are outstanding, the length of time it takes to review and assess complaints and determine how many more resources (financial and personnel) are needed to ensure complaints are adequately reviewed and timely resolved.

An additional concern is that the Review Committee only hears disputes at its quarterly meetings, which means that tribes have to wait months to have their matters addressed. In particularly complex cases, this could span over several meetings to ensure that tribes are able to present the Review Committee with all the available evidence. This further stalls the repatriation process and prevents our tribal ancestors and their belongings from appropriate and respectful treatment.

In addition to assessing the state of the complaint process and the needs of the staff in resolving timely complaints involving compliance under NAGPRA, we further suggest that the Committee consider reviewing the National Review Committee's needs. The information gathered will enable the Committee to have a solid understanding of the current needs and concerns not only of the tribes, but also of the Review Committee and associated staff.

As all of the examples we provide herein demonstrate, working together to accomplish the goals of NAGPRA is an essential component to successful repatriation, treatment and consultation. The first step in this process is determining the needs of all parties and we believe the assessments suggested here will be a great stepping stone to bring us closer to achieving the policy goals of the law.

e. Regional and Local Museum Compliance

Much of the focus on NAGPRA has involved compliance and repatriation issues with larger museums and educational facilities. Yet, there is another set of museums, and potentially smaller educational facilities that are subject to NAGPRA yet have little or no funding to complete inventories and/or repatriate items to the culturally affiliated tribe. To compound this problem further, these smaller institutions are simply so understaffed and underfunded that they do not even have the resources to apply for grants to administer NAGPRA. As such, tribes are unaware (and in many cases, the facility itself may not even be aware) of what is in the collections of smaller museums that may be subject to NAGPRA's repatriation provisions.

In our experience, this means that our ancestors and their belongings are still sitting, forgotten, in boxes, on shelves and are subject to continued disrespect and ill treatment. The end result is that either these items will never be returned to their proper place or tribes themselves must expend significant resources to discover these collections, often catalogue and inventory them themselves and at their own expense and initiate the return of these items to a place of final rest and respect. Below is an example the Pechanga Tribe experienced recently and would like to share with the Committee to illustrate this real and largely invisible problem.

Example: The "Lost" Collections

In February and March of 2008, staff from the Pechanga Cultural Resources Department visited a local county museum to view the "Temeku" collection that was excavated in the early 1950s. This collection relates to one of the most significant

cultural places of our Tribe, a village area on the National Register of Historic Places since 1973, and a part of the Luiseño Ancestral Origin Landscape. Staff confirmed that this particular museum did receive some federal grant money and as such, was subject to the provisions of NAGPRA. Sadly, our staff discovered that the collection had never been catalogued since the excavation, some nearly 60 years later.

At the time our staff visited the museum, the collection was stored in 16 archival boxes that were packed solid to the brim. In addition, there were also some larger loose pieces that were stacked haphazardly on some shelves. When our staff began looking through the archival boxes, they found that the contents of all of the bags excavated from the unit levels had never been separated into their appropriate assemblages, *i.e.,* lithics, pottery, and bone. Pechanga staff identified several pieces of what very likely appeared to be cremated human bones, that were mixed with lithics and other materials. Our staff completed a preliminary catalog at that time, which consisted of 1,122 bags of single and mixed artifacts.

In February of 2010, tribal staff returned to the museum in order to do a comprehensive inventory and to separate the unit/level bags into their proper assemblages. This was completed in June 2010 with the help of four interns from a local college. It is important to note that the Tribe, at its own expense and utilizing its own over-extended resources assisted the museum in this regard even though this responsibility mandated by federal law falls on the museum. When the inventory was completed, there were a total of 6,644 artifact bags containing either single artifacts or multiple artifacts of the same assemblages from the same unit/level.

The curator of the museum's anthropology department was grateful to have the Tribe complete the inventory and sorting of the artifacts as they have always lacked the staff and funding to complete those tasks, even though required by NAGPRA. Further, because the staff had not been able to complete an inventory, they were unaware that they had human remains in the collection.

We further discovered that this particular museum has nearly 150 collections from Luiseño sites in Riverside County that have never been catalogued. Over the next few years, the Tribe intends to work on inventorying and cataloguing these collections as well. Unfortunately, most of these collections are located in an offsite warehouse without any kind of climate control, which further endangers the human remains and cultural items in the possession of the museum.

This is only one example, and the Tribe has grievous concerns that many more situations like this exist across the Nation. This threatens both the policy and intent of NAGPRA as small institutions do not even have the resources to apply for federal monies to complete inventories under NAGPRA. Which in turn results in either the remains of our ancestors and their belongings sitting in boxes, on shelves, in rooms lacking proper climate control continues the disrespectful treatment of these human beings. Testimony given before the House in 2009 by Brenda Shemayme Edwards, Chairwoman of the Caddo Nation of Oklahoma, reminded us all that these are not objects. These are people, human beings, deserving of respect and dignity. Sadly, under the current federal scheme, many of our ancestors are invisible and may never be returned home for proper treatment and back to a final resting place, which all of us deserve as a fundamental human right.

Solution: Increased Funding and Access to Funding

While NAGPRA does provide funding for museums to complete inventories of their collections, the above example demonstrates how difficult it can be for small, underfunded museums to actually comply with the law. The first step to addressing this problem (which the Tribe suspects is a prevalent one) is to identify those museums who fall under NAGPRA and who have not completed inventories. Certainly, if an institution received federal funds there should be a record of that and these facilities can be identified through auditing those records.

Once smaller institutions are identified, additional technical assistance should be provided so that staff can submit grant requests. This will assist these facilities in retaining additional staff to catalog and inventory collections that presently sit unknown, in boxes and sometimes under terrible conditions and can then ultimately be returned to their people and a final place of rest. Without additional funding, these ancestors and cultural items will remain lost, or as the case with Pechanga, tribes will have to expend their own limited resources to fulfill the duties of the institution and remedy a problem that is not of our creation. We do not believe either result comports with the spirit, intent and policy of NAGPRA.

f. Unrecognized Tribes and NAGPRA

Federal laws such as NAGPRA that offer protections to the Nation's Indian Tribes do so because of the unique government to government relationship that exists be-

tween Tribes and the federal government. Pechanga intimately understands the plight of the many unrecognized tribes across the United States, especially because of the historical situation in California described earlier in this testimony. Unfortunately, the Tribe has at times found itself in the uncomfortable position of being placed in the middle of the distinctive challenges in which non-federally recognized tribes find themselves with respect to NAGPRA.

We understand that the National NAGPRA Review Committee has determined that in some instances, the involvement of unrecognized tribes may provide additional information not otherwise available to the Committee. Further, the Committee has determined that in some situations, repatriation of human remains and cultural items may be effected to such tribes. In fact, unrecognized tribes are occasionally listed on the Federal Register notice for the completion of an inventory and may submit claims for repatriation of items. Additionally, we have encountered federal agencies inviting unrecognized tribes to participate in consultation on projects and instances were inadvertent finds of human remains have occurred. While alone not problematic, the inclusion of such groups poses unique challenges to the recognized tribes that are rarely discussed.

With respect to repatriation, we have not yet faced a situation where the Tribe sought the return of human remains and cultural items and were confronted with a competing claim by an unrecognized tribe. However, we see that this could be an obstacle, particularly in California where there are over 50 unrecognized tribes. It is unclear how the National NAGPRA Review Committee would handle a situation where there were such competing claims because their discretion to involve unrecognized tribes is not governed by the statute or its regulations. As such, if the Review Committee intends to continue efforts to involve and repatriate to such tribes, there needs to be some governing process that would address competing claims from recognized tribes.

Furthermore, Pechanga has been requested on numerous occasions by non-recognized tribes, institutions and agencies to facilitate or "sponsor" repatriation of collections that are either culturally affiliated with a non-recognized tribe or categorized as culturally unidentifiable. This puts the Tribe in an awkward position of responsibility that is unreasonable—spiritually, culturally and politically. Although the Tribe has the resources and expertise to assist in this regard—which is why we have been called upon to do so—the Tribe cannot validate or take a position on the cultural affiliation or existence of a non-recognized tribe. These sorts of requests and situations have vast implications beyond the repatriation effort at hand and can be used for purposes other than the protection of human remains and cultural items under NAGPRA.

Although Pechanga does not want to see any cultural resources left orphaned and un-repatriated, we are of the position that it was never the intent of this federal law to place additional burdens on recognized tribes because of the problem of unrecognized tribes created by the Federal Government. We often find ourselves in uninvited situations which force us, a federally recognized tribe, to take positions with great political repercussions and further potentially causing great divide in our tribal communities, both recognized and not. We should not be asked to make determinations as to the validity or the ability of a non-recognized tribe to handle such repatriation or cultural resources management issues, but unfortunately this gap in the law has resulted in just that situation.

One issue the Tribe was recently confronted with involves the inclusion of unrecognized tribes in consultation processes with federal agencies and their participation in monitoring and the treatment of remains and cultural items discovered through intentional excavation and inadvertent discoveries. In recent months, it has become known to Pechanga that projects on MCBCP have included participation by unrecognized Tribes, to the exclusion of Pechanga and other federally recognized tribes whose ancestral territory encompasses the Base.

This poses several issues, one being that group consultation is generally not considered government-to-government consultation and violates not only NAGPRA, but other federal laws such as the National Historic Preservation Act. The second issue these "group" consultations create is that the information we share is not confidential and so the Tribe has to choose whether to offer the information we have in this setting, or expend further resources to attend another individual meeting with appropriate staff. Fortunately, MCBCP has been willing to also meet with Pechanga tribal representatives on an individual basis in addition to the group consultation, but the Base is nevertheless still conducting the "group" consultations. We note as well that in our experience, other state and local agencies conduct similar consultations, which raises the same implications.

Secondly, as you are aware, NAGPRA requires the agency to consult with federally recognized tribes who are or may be culturally affiliated to the remains and

items. The inclusion of non-recognized tribes during these consultations necessarily forces the recognized tribes to work with and validate or invalidate and oppose the positions of non-recognized tribal groups. The non-recognized tribes are allowed to offer treatment and disposition preferences that may or may not be congruent with those of the federally recognized tribes. Again, this situation places federally recognized tribes in the position of either having to forgo their own treatment preferences in favor of those made by non-recognized tribes and/or potentially pitting tribes against one another. Neither outcome is fair for the tribes and certainly creates difficulties for federal agencies responsible for completing consultation and determining the treatment and disposition of remains and cultural items.

As mentioned above, a further consideration is that, unfortunately, given their status as non-recognized tribes, it is unclear whether such tribes have the resources and infrastructure in place to repatriate and act as caretaker for these items. This is illustrated by the requests from such groups for Pechanga to act as an "umbrella" or facilitator for repatriation efforts.

Further complicating this landscape is that the Pechanga Tribe has been asked by federal agencies to "umbrella" or support unrecognized tribes in monitoring efforts. Unfortunately, the Tribe was asked to do this during a group consultation in front of other recognized and unrecognized tribes. This request places the Tribe in a very awkward position and because of the Tribe's sovereign status, we do not believe the request should have been made by the agency. Again, while we understand that federal agencies wish to include these groups because they may have information, we believe that consultation with federal agencies should be between individual recognized tribes and that agency. This issue points to another reason why a definition of consultation and guidelines would be helpful to agencies who find themselves in a region where both recognized and non-recognized tribes are located.

Again, it is unjust for a law that is supposed to be aimed at upholding basic human and tribal rights to force tribes into a situation where they are potentially pitted against one another and ask them to assume unrequested responsibilities which can implicate a tribe's cultural and political positions. Moreover, recognized tribes should not be put in a position of commenting on and/or validating a non-recognized tribe's political situation as a tribal entity.

Solution: Defining Consultation

As these issues demonstrate, the Committee should embark on specifically defining Indian tribes so that it is clear which tribes can participate and how they will participate without forcing tribes to become involved in the political and private business of other tribes. Another suggestion to addressing this issue would be to add in a definition of "consultation" to NAGPRA and its governing regulations. We respectfully refer the Committee to the consultation suggestion under item (a), above. We believe that adopting a definition of consultation and preparing guidelines or protocols will help alleviate concerns regarding proper and meaningful consultation between tribal governments and federal agencies and institutions subject to NAGPRA.

III. Implications of the United Nations Declaration on the Rights of Indigenous Peoples on NAGPRA

In addition to the concerns expressed by the Pechanga Tribe in this testimony, we further see that issues arising under NAGPRA implicate the United Nation's Declaration on the Rights of Indigenous Peoples. Because the United States has announced its support for the Declaration, and earlier this month this Committee considered the domestic implications of the declaration on the rights of indigenous peoples, this is a timely consideration for the Committee. NAGPRA has always been considered human rights legislation and in turn, is certainly legislation which intended to protect the rights of tribal peoples in the United States with regard to the return and treatment of their ancestors and cultural resources.

Of particular relevancy are Articles 11 and 12 of the Declaration. Specifically:

Article 11:

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken

without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

These provisions implicate many of the issues raised in our testimony, as well as testimony provided by others to the House during the 2009 hearings. In addition to the suggestions we have provided on how to begin remedying the gaps and shortcomings of NAGPRA, we urge the Committee to think about how clarifications, revisions, amendments and implementing regulations can be drafted to not only address concerns raised by tribes, but to also acknowledge these provisions of the Declaration. In so doing, we believe that the Committee will find a respectful and culturally sensitive balance that weighs the interests of all parties that work together on a daily basis to affect the policy goals, intent and letter of NAGPRA.

IV. CONCLUSION

Chairman and members of this Committee, on behalf of the Pechanga People, we extend our appreciation for this opportunity to testify on achieving the policy goals of NAGPRA. Respecting and protecting our tribal ancestors, their grave goods and final place of rest is so important to all of Indian Country. We support NAGPRA, and also support strengthening NAGPRA, so it can better meet the needs of all Tribal People. In addition, as the recent GAO report indicates, repatriation efforts at the Smithsonian raise many of the same implications and issues presented in our testimony regarding NAGPRA. We urge the Committee to also consider fixes for the repatriation process under the NMAI Act of 1989.

In addition to the concerns we have expressed above, the Pechanga Tribe, based on its own experience in trying to protect the Luiseño Ancestral Origin Landscape from Granite Construction's proposed Liberty Quarry, and from its conversations with so many other Tribal Leaders across California and elsewhere, respectfully urges this Committee to hold Oversight Hearings on the protection of Tribal Sacred Places at its earliest opportunity. There is much unfinished business and a real sense of urgency to preserve what remains of our sacred areas for Our People.

I am happy to answer any questions whenever the time is appropriate. Thank you.

The CHAIRMAN. Thank you, Mr. Macarro.

Mr. Wright, will you please proceed with your testimony?

STATEMENT OF HON. MERVIN WRIGHT, JR., VICE CHAIRMAN, PYRAMID LAKE PAIUTE TRIBE

Mr. WRIGHT. Thank you, Mr. Chairman.

First, I would like to thank the Committee for inviting each of us here to testify, all to discuss how NAGPRA ought to be interpreted to protect cultural rights. Second, I will highlight a few things gone wrong with implementing NAGPRA. And third, I will point out three key issues to correct the problems with implementing NAGPRA.

Congress intended actual repatriation as the foundation of the law as it recognizes and respects the sanctity of burial practices of native societies and people. To evaluate the statute is to take into account the values, cultural societies, and to accept the responsibility to respect our ancestral past.

NAGPRA is one of the very few Federal laws that affirmatively protects native culture, tradition and practices, and is one of only

two repatriation laws that respects our traditional practices governing life passages.

NAGPRA was intended for equal protection for native peoples and to make a place at the decision table for native peoples. Native people are human beings with human rights, including the right to be buried and to stay buried. NAGPRA recognizes that right.

Traditional burials or funerals are communal and maintains principles to honorable memorialize and respect the lives of individuals. This is the foundation for sacredness that connects the land to native peoples and to our relatives. The ability to connect common traditional principles to the philosophical network of a legal bureaucracy rests upon officials that can digest the tenets of tribal and Federal laws.

The failure of museums and agencies to comply with NAGPRA demonstrates that noncompliance is not a priority of the Federal Government. The merits of consultation have not provided meaningful exchange resulting in mutual decisions for parties to experience equal satisfaction.

This is a disconnected attribute creating the disguise of impossibility for successful repatriation. The lack of action is present because authorities that govern specific responsibility condone noncompliance. At one point, the NAGPRA Office was going to promulgate a rule that all culturally unidentified human remains were the property of the holding repositories. Although the NAGPRA law has a place for oral traditions, the bureaucracy has convoluted the procedures to involve so much unsupported hypothesis that the term becomes a complicated network of reality in the minds of Federal officials.

Theories are tested by experiment, while traditional insights are concluded by experience. No deceased person or no one who was responsible for burial rites in the early stages of this Country has ever given consent to disturb and desecrate burials with the purpose of permanent removal. Tribal nations have relied upon oral traditions as it is real to acknowledge our existence today.

The trace steps back in time are supported by the cultural continuity since time immemorial. There is a small, but powerful group of non-native scientists who are trying to prove that non-natives were here before native people and our ancestors and lands are really theirs. That wrongheaded notion is behind the current effort to hold onto what could be their evidence.

Nature and the exact science of our age is more about the method of questioning. What is not known will be phrased in a question so eloquent that it will become conclusive. The term culturally unidentified is a problematic situation. Unfortunately, the interim rule issued on March 15, 2010 fails to accomplish the goal of Native American repatriation.

The traditional burial is inclusive of everything in the funerary process, as well as everything in the ground or in caves or on scaffolds at the site. The Department of Interior conducted horse trading with the rule. In the end, the tribes could receive the human remains, while the museums keep the funerary objects which they can sell, trade, or deal away irrespective of the policy goals of repatriation laws.

It creates a public policy that grave robbing of objects is acceptable. It conflicts with longstanding principles of property law. It suggests there is a different right of possession for objects and the people that were unearthed together.

The Native American definition is also troublesome. The definitional term is interpreted to mean that anything older than 1776 is not Native American. The policy of NAGPRA for native peoples is inclusive for timeframes prior to 1776. Our history becomes prehistory and pre-Columbian.

The technical amendment to the law was proposed in the past only to be held up by previous Administrations in three sessions of Congress. The Administration has not expressed opposition, but has yet to release its position on the technical amendment. It is reasonable, logical and rational. I urge the Committee to ask the Administration's view on the technical amendment and to get past the stalemate.

Native peoples are the only peoples in the United States that do not have a door to the courthouse to protect our sacred sites. The United States must ensure that all people, including native peoples, are treated equally under its laws and enact a statute creating a right of action for Native Americans to protect our sacred places.

The United States is being asked to assist and support American citizens seeking equal protection and fair application of its laws. We do not understand why we are being denied. Together, we can move forward in a right direction if we keep our eyes on the policy goals.

Thank you.

[The prepared statement of Mr. Wright follows:]

PREPARED STATEMENT OF HON. MERVIN WRIGHT, JR., VICE CHAIRMAN, PYRAMID LAKE PAIUTE TRIBE

Thank you for holding this hearing on the policy goals of the Native American Graves Protection and Repatriation Act, a Native American human rights law, and for inviting me to testify. My name is Mervin Wright Jr. and I am the Vice Chairman for the Pyramid Lake Paiute Tribe. I have worked with the NAGPRA law for 19 years. In 2009, I was appointed to the NAGPRA Review Committee in my capacity as a traditional practitioner and cultural leader. I am a founding member of the national Working Group on Native American Culturally Unidentified Human Remains and have served on it for 11 years.

I am going to discuss three issues in my testimony today. First, I want to discuss how NAGPRA ought to be interpreted as a federal statute that affirmatively protects tribal cultural rights. Second, I want to highlight a few things gone wrong in the implementation of NAGPRA. Third, I will point to three key issues which must be addressed, in order to correct the problems that have been documented with the implementation of NAGPRA.

I. How to Evaluate the Statute

The rights protected under the Constitution are those that are considered sacred to values and principles for the law of this land. Just as the right to free speech and religious freedom are, the same protections must be provided for the indigenous traditions governing life from birth to death and for what is understood as life after death. Congress intended actual repatriation as the foundation of the law as it recognizes and respects the sanctity of burial processes and practices of Native societies and Peoples. The human rights, the civil rights, and the indigenous rights of Native Peoples were evaluated in enacting the law. Our efforts to satisfy the intention of repatriation, however, have gone ignored through some procedures implementing, administering and managing the law.

We welcome this oversight hearing to evaluate the purpose and requirements to complete the successful repatriations and to discover that repatriations from many collections are becoming more problematic as time passes. To evaluate the statute is take into account the values and the attributes of cultural societies and to accept the responsibilities to respect the ancestral past. It is hoped that this hearing will return everyone to the policy framing by Congress; the policy was enacted in the best possible way, but it has been derailed.

NAGPRA provisions must be applied, interpreted, and implemented consistently with the federal trust obligation to protect Native communities from dominant authority actions that aim to destroy Native cultures. NAGPRA is one of the very few federal laws that affirmatively protects Native culture, tradition, and practices, and is one of the only two repatriation laws that respects our traditional beliefs and practices governing life passages. Native People within the United

States are compelled to conform to the written law as created and developed by federal solicitors, attorneys, and court judges. However, the Indigenous sovereign status over spiritual and cultural responsibilities is not governed by a man-made law; it is rather founded in the natural unwritten law of creation. It is our responsibility to connect our ancestral past to present day society and its institutions of governance. Man-made laws are destined to error and become adjustable to the satisfaction of political constituencies.

For centuries, Native Peoples' burials have been disturbed, desecrated, and destroyed. Since the 1906 Antiquities Act, the federal Government has not adequately acknowledged protecting ancestral burials or the sacred lands for which they are located. The passage of the NAGPRA was an effort to establish a means and purpose for Tribal societies to recover, repatriate, and protect burial items and human remains of our ancestral past. NAGPRA is a law to free Native Peoples from the legalities and regulatory categories as and of United States archeological resources. It is difficult to imagine how this law was the result of a compromising effort on the part of the scientific community, and whatever it compromised in policy, it has undone in dominating the NAGPRA office and regulatory process. The main reason for opposition for complete repatriation is because of repatriations that are occurring. NAGPRA was intended to provide equal protection for Native Peoples and to make a place at the decision table for Native Peoples. More and more, we are not being heard and our voices are being ignored.

Since 1990, much work was completed to achieve the goal of NAGPRA. However there is so much more work to fully achieve the intent of NAGPRA. Native Peoples have lived here in our aboriginal lands for untold generations. To survive onslaughts, we have adapted and adjusted,

but we retain our cultural integrity. Cultural existence is evidenced in our origins and in our modern life. Our ceremonies and practices involving passages and afterlife are sacred. Native People are human beings with human rights, including the right to be buried and stay buried. NAGPRA recognizes that right and is our human rights law.

Our burial traditions are continued to be practiced today as they were long ago; the only difference is the material world of today. Traditional burials (or funerals) are communal while maintaining the principles of honorable memorialized and respectful practices of individuals. Placing cherished precious personal belongings with a person is a practice that reflects upon the person's life and identity. Their items as they are buried with or surrogates for Native People belong to and with the deceased in perpetuity. This is the foundation for sacredness that connects the land to Native Peoples and our relatives.

The respect a society places upon their dead is set in the highest regard of societal customs; this is common in all cultures and societies. The desecration and vandalism in modern day cemeteries creates outrage toward those who conduct such blasphemous acts. The treatment of ancestral burials in the same manner is no different. The mere act of a kind thought, a kind gesture, and sincere feelings expressed is the prayer blessing over the spirit and soul that provides the traveling journey to the afterlife. The same act is applied to the entire family and community as they participate in a burial practice (or funeral). To disturb the dead at rest and their treasures and/or surrogates is to interrupt their journey in their afterlife, and to do the deceased and their relatives, their moieties, their community and their tribes and nation's irreparable harm. The ability to connect these common traditional principles to the philosophical

network of a legal bureaucracy rests upon officials that can digest the tenants of tribal and federal laws.

II. What is Going Wrong

The Government Accountability Office issued reports in 2010 and last month. The reports are disturbing because they identify what has gone wrong. (1) The GAO documents the harms caused in the past. Every detail is reported in the GAO report. There are regulatory requirements that prohibit and restrict the successful repatriation of tribal burial collections. These requirements are restrictive by the nature of their ambiguity and the legal interpretation of such loopholes. Be it constrained financial resources, the lack of staff support, or the lack of motivation; to see that so much time pass without adequate response is unacceptable. (2) The failure of museums and agencies to comply with NAGPRA demonstrates the seriousness that noncompliance is not a priority of the Federal Government. To engage in consultation, for example, is just now finding a policy document that will require meaningful consultation to make a decision.

The Department of Interior reports that it is in total compliance with the consultation requirements for the principles of government to government responsibility. At the heart of the repatriation implementation is the matter of control. (3) The merits of consultation have not provided a meaningful exchange resulting in mutual decisions for parties to experience satisfaction. The principles of property law and common law are those that have been made up to deal with present day situations. The ancestral burial collections are not that which can be administered or managed by bureaucratic proceedings. This is a disconnected critical attribute

that creates the disguise of impossibility for successful repatriation. The lack of action is present because the authorities that govern specific responsibility condone noncompliance. The current transparency policy and the Government Performance and Reporting Act (GPRA) should be applied for ultimate disclosure of all activities that would demonstrate the federal government's ability to assure compliance.

(4) The term "culturally unidentifiable" is a term that was made up as a place holder in the legislation. In fact, it was a compromise forced to be accepted to allow the legislation to move forward. The term is a buzzword that has taken on a new set of circumstances that can be used quite loosely; it means whatever the bureaucrat believes it to mean. It is a term that cannot be supported with scientific certainty. In fact, most of the people and things in this category can be identified, if only the tribes have the same information the repositories have. At one point, the NAGPRA office was going to promulgate a rule that all culturally unidentified human remains were the property of the holding repositories. Our working group sounded the alarm in Indian Country and we forced the NAGPRA office to set up the information data system which exists now, and increasing numbers of the human remains are being identified. However the NAGPRA office has declared that the funerary items of the deceased Native Peoples are the property of the holding repositories, which is discussed later in this testimony.

Traditionally, tribal customs and oral teachings take Native origins to time immemorial. Although the NAGPRA law has its place for oral traditions, the bureaucracy has convoluted the procedures to include and involve so much unsupported hypothesis that the term becomes a complicated network of reality in the minds of federal officials.

No deceased person or one who was responsible for burial rites by Native communities at the beginning when the collections of Native burials started in the early stages of this country has ever given consent to disturb and desecrate burials with a purpose of permanent removal. There is no permission form, no last will and testament, or no transfer of title that can be made a part of the formal legal process. It is just not possible in the customs of Native traditions.

Tribal nations have relied upon oral traditions; as it is real to acknowledge our existence today. The traced steps back in time are supported by the cultural continuity since time immemorial. Just as the 9,000 plus years' burial items were removed from Grimes Point in Nevada, it was those same items that are still used today by present day Paiute People. After 1990, the collection became "culturally unidentifiable." The decision to categorize it was done isolated from any consultation process without permission to affiliate collections to this category.

Since 1990, burial collections in museums and institutions are frozen and have increased immensely because of this "new category" and there seems to be no effort to control how "culturally unidentified" collections will cease. The number of human remains currently stands at approximately 125,000, while burial items amount to approximately 875,000. This number has increased two and three fold as the process for developing the regulations directing the disposition of these items. It should be noted that there is a small but powerful group of Non-Native scientists who are trying to prove that non-Natives were here before Native Peoples and our ancestors and lands are really theirs. That wrongheaded notion is behind this current effort to hold on to what could be their "evidence."

III. What Should Be Done

Issue 1: Instead of trying to agree to the conditional terms of Native Peoples' customs, traditional law, and oral tradition, the Federal Government promulgates regulations that are aimed to force the disposition of Native burial collections. Unfortunately the interim rule issued on March 15, 2010 fails to accomplish the goal of Native American repatriation. The proposal regarding funerary objects is arbitrary, capricious, and is contrary to the law. It will never accomplish a complete and successful repatriation. A traditional burial is inclusive of everything in the funerary process, as well as everything in the ground or in caves or on scaffolds at the site, and NAGPRA recognizes this. Tribes were never included in the development of the rule but the scientific community was included and tribes are forced to accept the rule. The Department of Interior conducted "horse trading" with the rule; in the end the Tribes could receive the human remains while the museums keep the funerary objects, which they can sell or trade or deal away, irrespective of the policy goals of repatriation laws, which is to return people and things to their cultural context. In the case of surrogates, they are ignoring that these are the very human beings in our traditions and in the federal law. In the case of other funerary items, they are ignoring the wishes and rights of the deceased and their loved ones, which goes against laws governing such matters for all other people. Congress was clear that funerary objects are to be repatriated and there is no law that authorizes separation.

The 2010 rule must be withdrawn, reversed and/or amended in order to clarify that all of the cherished items and objects are to be included in any burial collection that qualifies under the rule. To leave it as is allows and promotes disrespectful practices in the name of an honorable act. It creates a public policy that grave-robbing of objects is acceptable; it conflicts with longstanding principles of property law; it suggests there is a different right of possession for

objects and the people that were unearthed together; it suggests there is a different right of possession based on whether objects are "culturally unidentifiable." The sacred law of burials cannot separate human remains from the funerary objects and burial items. This is true for all peoples and should be so for Native Peoples. The Administration's interpretation differs widely from what Congress intended and from NAGPRA's policy goals.

In NAGPRA, the United States was trying to do the right thing and make up for a long history of grave-robbing and other bad acts. There are those who continue to thwart NAGPRA's policy goal of doing the right thing and twist the law in order to continue bad practices. In the Kennewick case in the 10th Circuit, the definition of Native American was pushed to extremes, in order to keep NAGPRA from applying and to recategorize us as archeological resources. The definitional term "that is" was interpreted to mean that anything older than 1776 is not Native American. The policy of NAGPRA for Native Peoples is inclusive for time frames prior to 1776. The Tribes have proposed the technical amendment to the Native American definition in NAGPRA to include two words, "or was," after the present day literal interpretation of the two words, "that is."

This situation forces a set of circumstances that places Native history into a realm of becoming absurd, even to the point of calling our history "prehistory" and "pre-Columbian.". The technical amendment to the law was proposed in the past only to be held up by the previous Administration in three sessions of Congress. On the eve before the hearing on this technical definition "fix," Secretary Gail Norton reversed her position of support and objected to the amendment. This stalemated the process. At this time, the Administration has not expressed

opposition, but has yet to release its position to support the technical amendment. Congress has the remedy to enact the technical amendment as it has been presented over the past ten years.

Issue 2: This technical fix is straightforward and it is not understood why the federal government would not be supportive to this change. It is reasonable, logical, and rational. At this time, it is a reasonable expectation that the Administration supports this clarification with this proposed technical fix. It has not moved because the Interior officials say that Congress has to ask their views, and the past representatives of this Committee have said they cannot move the amendment because the Administration opposes it. I urge the Committee to ask the Administration's views on the technical amendment and to get past this stalemate.

Issue 3: Native burials and the funerary process transforms the ground to hallowed ground, unlike all other people in America, Native Nations are unable to bring legal court action to protect sacred places. The sanctity in burial sites and their locations are situations that requires formal acknowledgement to support the protection of any such burial that may lie in certain areas or specific locations. Native Peoples are the only peoples in the United States that do not have a door to the courthouse to protect our sacred sites. The United States must ensure that all people, including Native Peoples are treated equally under the United States laws and enact a statute creating a right of action for Native Americans to protect our sacred places, too.

In times where consultation on sacred sites in line of a construction project may have occurred normally forces mitigation for a project to be completed. Tribal objections are only considered in the decision to proceed. In instances where a site is identified prior to construction, anthropological and archeological theories supersede oral tradition and cultural knowledge, and Native Peoples' views and voices are ignored.

The United States is being asked to assist and support American citizens that are seeking equal protection and fair application of its laws. We do not understand why we are being denied. Together, we can move in the right direction if we keep our eyes on the policy goals.

If you have any questions, I will be happy to address them. Thank you.

The CHAIRMAN. Thank you very much, Mr. Wright, for your testimony.

Mr. Isham, will you please proceed with your testimony?

STATEMENT OF TED ISHAM, CULTURAL PRESERVATION MANAGER/TRIBAL HISTORICAL PRESERVATION OFFICER, MUSCOGEE (CREEK) NATION

Mr. ISHAM. Thank you.

[Greeting in native language]. I am Ted Isham, Wind Clan of the Hillabee Canadian Ceremonial Grounds. I am a citizen of the Muscogee Creek Nation and also work for the tribe. As you mentioned, I am the THPO for the tribe. I was a previous curator of our tribal museum, the Creek Council House Museum. And I am also the language instructor for Oklahoma State University there.

I bring greetings to you from our leaders [greeting in native language]. And I thank you for this opportunity to discuss repatriation and cultural preservation issues.

[Phrase in native language] I ask at this time that my written statement be entered into the record.

The CHAIRMAN. It will be included.

Mr. ISHAM. My testimony focuses today on Public Law 101–601, the Native American Graves Protection and Repatriation Act, and Public Law 101–185, the National Museum of the American Indian Act, which includes repatriation provisions for the entire Smithsonian Institutions.

The Muscogee Creek Nation believes that the Native American Graves and Repatriation Act, NAGPRA, was and is designed as a Native American human rights law, an effort to right an inherently wrong, basic wrong. NAGPRA was enacted in response to accounts that spanned many generations. These accounts document a spectrum of actions from harvesting of human remains to disinterments and theft of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that belong to a collective native community that includes families, clans, societies, longhouses, ceremonial grounds and other moieties.

The current reality of repatriation in America is that native nations carry almost the full burden of proof in making claims of repatriation with Federal agencies and with the Smithsonian Institution. This was not the intent of either Federal law. The basic premise that surrounds the repatriation process is the concept of meaningful consultation. This concept is not being embraced, much less practiced in a uniform manner, by Federal agencies, museums and educational institutions in the realm of repatriating our Native American ancestors and cultural objects.

This remains a stumbling block to the achievement of the goals of NAGPRA. I have two examples of this, and one is with the Tennessee Valley Authority, which has been mentioned in the GAO report. They have had a history of lack of tribal consultation and no cultural affiliations of some of their collections. As a result, they have 8,368 culturally unidentified human remains in their collections, and this listing was done without tribal consultation, adding to decades of this process of the repatriation.

And the second one I want to mention is the Sam Noble Museum in Oklahoma, with their withdrawal of cultural affiliation status without tribal consultation of 3,889 human remains, also adding decades to the process of repatriating those.

Today, there is an extraordinary hardship put upon Indian nations because of how NAGPRA has been implemented by non-na-

tive people. Additionally, the lack of funding, staffing and specific Western and museum expertise further exacerbates the situation and put Indian Country further behind. The sheer number alone of Native American ancestor remains that have been disturbed must be addressed.

The GAO report states that it may take several decades for the Smithsonian to complete their work. And it also appears that repatriation using NAGPRA may take possibly hundreds of years to work through this process unless changes are made to the implementation.

What has gone wrong? Why is this taking so long? In looking at these charts, you will see that after 20 years of implementing the Act using NAGPRA process, 180,168 Native Americans have been identified by museums and Federal agencies in their collections. Unfortunately, one-quarter of this amount, approximately 53,843 have been culturally affiliated. The remaining 126,325 Native Americans remain in Federal museum repositories and are now referred to as culturally unidentifiable. The common term is CUI.

Because these Native Americans have been given this designation, the burden is now on the native tribes and Native Hawaiian organizations to conduct the research as to possible affiliation and then submit a request for all information on that entry and then to start that repatriation process.

In looking at the chart that demonstrates the Smithsonian, the second chart that we have, we see that there is approximately the same amount of affiliated remains, about one-quarter of all Native American remains that have been culturally affiliated, and the repatriation process at the Smithsonian is the same as has been noted above. For a tribe to research and request more information about the culturally unidentifiable is an extensive and lengthy process. The burden is on the tribes to conduct this research and request process, and most simply do not have the resources to do this important work.

In terms of solutions, the Muscogee Creek Nation and 12 other federally recognized Indian tribes that have combined membership of over 1 million tribal members deliberated in October 2010 and developed the resolution. After receiving the GAO report, NAGPRA, after almost 20 years, that no enforcement mechanisms exists to ensure NAGPRA compliance by Federal agencies. The full resolution is included in my testimony.

We urge that the Congress review our recommendations and work with us to remove the challenges and barriers of the repatriation process.

In terms of the GAO's report, I will officially request that also Congress ask the GAO to finish their repatriation investigations by reviewing the museums also.

I would like to thank the other 117 THPOs, Tribal Historic Preservation Officers, for their work and dedication. And I would also like to thank the National Association of Tribal Historical Preservation for all their hard work and support in this area.

In closing, Lisa Larue from the United Keetowah Band of Cherokees in Oklahoma recently said these words at a recent gathering in Norman, Oklahoma, "It is a shame that some of our ancestors

have been in boxes and on shelves for a longer time than they have walked on this Earth."

I would be happy to answer any questions that you have. Thank you. [phrase in native language].

[The prepared statement of Mr. Isham follows:]

PREPARED STATEMENT OF TED ISHAM, CULTURAL PRESERVATION MANAGER/TRIBAL HISTORICAL PRESERVATION OFFICER, MUSCOGEE (CREEK) NATION

I am Ted Isham of the Wind Clan and of the Hillabee Canadian Ceremonial Grounds, Muscogee (Creek) Nation citizen and live in Okmulgee, Oklahoma and I also work for the Muscogee (Creek) Nation. My title is Manager of the Cultural Preservation Office and Tribal Historic Preservation Officer (THPO). My previous job was Curator of the Creek Council House Museum in Oklahoma so I am very familiar with museum practices. I am also the language instructor of Muscogee at the Oklahoma State University.

I bring you greetings from our Nation's leaders.

The Muscogee (Creek) Nation believes that the Native American Graves Protection and Repatriation Act (NAGPRA), enacted in 1990, was and is designed as a Native American human rights law—an effort to right an inherently basic wrong. NAGPRA was enacted in response to accounts that span many generations over the significant portion of two centuries. These accounts document a spectrum of actions from harvesting Human Remains from the battlefield to disinterment of existing graves and theft of Native American Human Remains, Funerary Objects interred with the deceased at burial, Sacred Objects of different types, and objects of Cultural Patrimony that belong to the collective Native community—families, clans, societies, longhouses, ceremonial grounds and other moieties. Within a few years time, two public laws were enacted that forever changed how Native Americans are viewed today:

- Public Law 101–601, the Native American Graves Protection and Repatriation Act (NAGPRA), enacted November 16, 1990).
- Public Law 101–185, the National Museum of the American Indian Act that includes repatriation provisions for the entire Smithsonian Institution, enacted November 28, 1989; amended 1996.

A basic universal human right is to express and carry out self-hood as deemed appropriate by the people themselves. The policy goal of NAGPRA is to treat our people as human beings with inalienable rights, rather than as archeological resources of the Federal government and private academics. In death, our ancestors were sent on a journey that has no boundaries of time and the disruption of that journey has no concept in our minds, beliefs, and culture, the same as if your relatives are buried today, the expectation is that their journey will not be interrupted.

NAGPRA was intended to stop and provide a remedy for the disruption of Ancestral Remains. We find the implementation of the law has many areas of conflict with the policy goals, such as ideas of "control" and "ownership" of human remains; problems with funding to get the job accomplished; and new objectionable actions on top of the egregious actions that the law was intended to remedy.

The intent of the law is clear—to respect and recognize Native rights, histories, traditions, cultural context and voice—and there are a great many people who abide by the intent of the law. There are others who are scofflaws and who are trying to dehumanize us again in the way that they choose to ignore this important federal Indian law. Some repositories and scientists seem to view their collecting interests as trumping the moral and ethical interests that made NAGPRA such a far-reaching landmark federal policy. We still battle to help our Ancestors find their way home and we ask you for your continued support help us implement the law as it was envisioned. The Muscogee (Creek) Nation is grateful for the opportunity to come here today to bring these points to your attention.

NAGPRA is intended to alleviate situations brought on by the European and Euro-American tradition of collecting the "other." The current reality of repatriation in America is that the Native nations carry almost the full burden of proof in making claims of repatriation with Federal agencies and with the Smithsonian Institution. This was not the intent of NAGPRA and I don't believe that this was the intent of Congress with the Smithsonian. This places an extraordinary hardship on many nations due to lack of funding, staffing, and expertise, among other reasons. The sheer number of ancestral remains that have been disturbed must be addressed. The Government Accountability Office (GAO) states that it may take sev-

eral decades for the Smithsonian to complete their work (GAO–11–515). It also appears that repatriations using NAGPRA may take possibly hundreds of years to work through the process unless changes are made to the implementation of the act.

Federal Agency Example of How NAGPRA is not Meeting its Congressional Mandate

With the release of the GAO report on the federal agencies' compliance with the NAGPRA law, *NAGPRA—After Almost Twenty Years, Key Federal Agencies Still Have Not Fully Complied with the Act (GAO–10–768),* one of the largest holders of Human Remains and Associated Funerary Objects, the Tennessee Valley Authority (TVA), is just now coming to realize that it, too, must consult in earnest with the tribes after ignoring this responsibility for the past 20 years. The vast majority of the collection that the TVA has accumulated comes from the southeastern United States, the original homelands of our Muscogee (Creek) Nation and related peoples. The TVA has classified almost all of the 8,368 Native American remains in its control as unaffiliated, without conducting proper tribal consultation to reach that decision. The Muscogee (Creek) Nation is one of the Indigenous peoples who lived in the region for at least 1,000 years, according to oral tradition and physical evidence. The likelihood that these Native American human remains and associated funerary objects can be culturally affiliated to our tribe is very high. The proclivity of the TVA to utilize archaeologists who seemingly make cultural affiliations or un-affiliations without tribal consultation as required by law makes the repatriation process very difficult for the tribes to complete.

The *Tennessee Valley Authority (TVA)* manages 293,000 acres and 11,000 miles of public shoreline in the Tennessee Valley. According to the agency Website, TVA Cultural Resources staff consult regularly with 18 federally recognized tribes. No Notices of Inventory Completion and no Notices of Intended Disposition have been submitted to the National NAGPRA office to date. A minimum of 8,368 Native American human remains and 20,870 affiliated funerary objects are curated at various museums, including the Alabama State Museum of Natural History, University of Alabama, and at the Frank H. McClung Museum, and the University of Tennessee-Knoxville. Other repositories have not been identified.

Relied on repositories to compile and submit inventory and summary documents. TVA relied on its own records and those of its repositories to identify the locations of its archeological collections. TVA generally relied on repositories in possession of its collections to compile the agency's summaries and inventories. The repositories prepared these documents more than 10 years ago. For TVA's collections at the University of Alabama, TVA has not conducted specific consultations on cultural affiliations. As a result, TVA considers its inventories to be preliminary since the required consultations have not yet occurred.

Lacks compliance data and faces other challenges. According to TVA's NAGPRA coordinator, a database of TVA's NAGPRA collections is being developed. TVA cultural resources management staff stated that due to gaps in communications, a lack of consultations, and other challenges, TVA has not been able to establish final cultural affiliations for any of the NAGPRA items in its historical collections. In addition, for NAGPRA items that were excavated during the course of TVA projects several decades ago, some ambiguity may exist as to which entity—TVA or the museum that curates the items—has legal control over the items, according to TVA.

Museum Example of How NAGPRA is not Meeting its Congressional Mandate

All museums and Federal agencies were required to complete inventories of Native American human remains and associated funerary objects in their collections by November 16, 1995, and notify all culturally affiliated Indian tribes and Native Hawaiian organizations by May 16, 1996. A copy of each notification was to be sent to the National Park Service, which was to publish the notice in the Federal Register. The repatriation process cannot move forward without publication of the notice. In 1996, the Sam Noble Oklahoma Museum of Natural History in Norman submitted its notices and several were published. However, the remaining notices—accounting for the remains of 3,889 Native American individuals and 18,296 associated funerary objects—were withdrawn from the publication process on November 8, 2007, by a decision made by the National Park Service and the Sam Noble Museum. The affiliated Indian tribes were not consulted on this decision and these 3,889 Native Americans are not only no longer "affiliated," they are no longer on any list and in fact have "disappeared." These Native American ancestors remain on the museum's shelves, unable to proceed on their journey until the museum and the National Park Service publish the required notifications in the Federal Register or at the least, they classify them as culturally unidentifiable.

The basic premise that surrounds the repatriation process is the concept of meaningful consultation. We believe that even with President Obama's November 2009 direction for each agency to engage in meaningful tribal consultation, this concept is not being embraced, much less practiced in a uniform manner by federal agencies, museums and educational institutions in the realm of repatriating our Native American ancestors and cultural objects. This remains a stumbling block to the achievement of the goals of NAGPRA. We are not at the table at the important decision-making stages and we need to be included. The federal and federally-assisted entities do not have the historical, traditional knowledge that we have, no matter how much they think they know about us. We are the only ones who can represent our interests and those of our relatives. The TVA, other Federal agencies, and museums discount our oral history and our traditions, as well as our cultural, historical, linguistic, geographical and other ways that we are related to and affiliated with other Native nations, tribes, tribal towns, confederacies and peoples. Even when they are aware of this unique knowledge, we are still excluded from important parts of the processes affecting NAGPRA and as a result, our voices are not heard. As a result, over 126,000 of our Ancestors are being described as culturally unidentifiable and are being held like prisoners of war, locked away in universities, agencies, historical societies and other repositories, and federal monies assist them in this warehousing of Human Remains. This is the opposite of the policy goal of NAGPRA.

The National NAGPRA Program office and others claim that there is no clear direction for who is in "control" of the Human Remains and Associated Funerary Objects that were disturbed and "collected" by actions of TVA and other agencies and repositories. The entity that is curating and completing the collection work makes its own case for claiming "control" of Human Remains and Associated Funerary Objects. This reverses the NAGPRA policy goal and is best seen in the recent federal rule that separates the Associated Funerary Objects from the Human Remains and "gives" the Associated Funerary Objects to the holding repositories, thus stealing from the deceased Native people once again. The Associated Funerary Objects belong to our Ancestors and Relatives. They are not the property of the federal government. The federal agencies do not have the right to "give" them to another entity. The repositories do not have the right to accept the Associated Funerary Objects or to keep them or to study them or to deal them away to others. Just because the repositories robbed graves or paid the grave robbers or received the grave robbers' contraband through third or fourth parties, the repositories have no clean title or claim to the treasures of our Ancestors and Relatives.

Administrative Remedy

The policy goal of NAGPRA is that the Associated Funerary Objects would be returned to their respective Native American communities. We ask the Committee to urge the Administration to amend the rule on culturally unidentified Human Remains issued on March 15, 2010, so that the Human Remains are repatriated with their Associated Funerary Objects subject to repatriation processes. (Attached is the National Congress of American Indians resolution of November 2010, Opposition to the New Rule on Funerary Objects Associated with Culturally Unidentified Human Remains, which we endorse.) To be perfectly clear, we oppose the rule to the extent that it does not mandate the return of our Associated Funerary Objects. We want any and all implementation of section 10.11 (c) (4) of the rule to cease, and for that portion of the rule to be revised. The Associated Funerary Objects are the primary means of identifying the unidentified Human Remains—and the policy goal of that section of NAGPRA is to identify what the repositories claim as unidentifiable Human Remains. We are deeply concerned that the Associate Funerary Objects will be further separated from the Human Remains, making their identification even more difficult, if not impossible. Revision of the rule on Associated Funerary Objects would be consistent with the NAGPRA policy. The Administration claims that Congress did not make its intentions clear and that it cannot act without further guidance from Congress. We believe that Congress made itself clear in setting the NAGPRA policy goals, that the Department of the Interior through the National NAGPRA Program office substituted its judgment for that of Congress and that the Administration can revise the rule now and does not need to wait for Congress.

The lack of a publicly available and agreed upon tribal consultation policy and protocol for repatriation purposes remains a stumbling block to the achievement of the goals of NAGPRA. Consultation is a bedrock of the repatriation process and there needs to be consultation guidelines for the full range of Native cultural rights. Consultation with full participation of the tribes at all levels of the notification process is the only way to insure success of the repatriation.

Legislative Remedy

A technical clarification is needed in the legal definition of "Native American" by enacting the "or was" amendment that the Committee has recommended several times. Without the regulatory change and the technical amendment, we are impeded in our efforts to conduct repatriations and the institutions will continue to hold and "study" our Ancestors and Associated Funerary Objects. This and other such blocking mechanisms make it very difficult for any tribe to complete the NAGPRA process. Attached are two resolutions of the National Congress of American Indians, which address these issues.

Recommended Solutions for Federal Agency Compliance with NAGPRA

In October 2010 and in preparation for the 20th anniversary of the signing of the NAGPRA, the Oklahoma Coalition of Tribes (OCoT), a newly formed organization of tribes representing one million Native Americans primarily from Oklahoma, developed and issued a resolution for Secretary of Interior Ken Salazar that lists the shortcoming of NAGPRA and recommends how to improve the process. The following resolution was also delivered to the National NAGPR Review Committee in November 2010.

RESOLUTION OF A COALITION OF AUTHORIZED REPRESENTATIVES OF OKLAHOMA AND SOUTHERN INDIAN TRIBES ON THE 20TH ANNIVERSARY OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

WHEREAS: In recognition of the 20th anniversary of the signing of the Native American Graves Protection and Repatriation Act, authorized representatives from the federally recognized Choctaw Nation of Oklahoma, Chickasaw Nation, Caddo Nation, Osage Nation, Seminole Nation of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Quapaw Tribe of Oklahoma, Jena Band of Choctaw Indians, Kaw Nation, Absentee Shawnee, Sac and Fox Nation, and Muscogee (Creek) Nation, and the Citizen Band of Potawatomi Indians, representing over 1,000,000 tribal members, met in Durant, Oklahoma, on October 26–27, 2010, to discuss NAGPRA; and

WHEREAS: The authorized tribal representatives submit this resolution to the Secretary of the Interior; and

WHEREAS: As experienced by the above Indian tribes and documented in the recent Government Accountability Office (GAO) report, *NAGPRA—After Almost Twenty Years, Key Federal Agencies Still Have Not Fully Complied with the Act,* no enforcement mechanism exists to ensure NAGPRA compliance by federal agencies; and

WHEREAS: As experienced by the above Indian tribes and documented in the recent GAO report, federal agency representatives report that NAGPRA is a low priority within their agency; and

WHEREAS: As documented in the recent GAO report, the National NAGPRA Program has not effectively carried out its responsibilities; and

WHEREAS: As experienced by the above Indian tribes and documented in the recent GAO report, key federal agencies are still out of compliance with NAGPRA and have not published Notices of Inventory Completion in the Federal Register; and

WHEREAS: As documented in the recent GAO report, a lack of transparency and objectivity exists in the actions of the National NAGPRA Program and the Review Committee; and

WHEREAS: As experienced by the above Indian tribes and documented in the recent GAO report, civil penalty allegations against museums have increased dramatically over the past three years; and

WHEREAS: At the current rate of the NAGPRA process it will require some Indian tribes (e.g. Caddo Nation) more than a century to repatriate their *known* culturally affiliated human remains, associated funerary objects, sacred objects, and items of cultural patrimony; and

WHEREAS: According to the National Park Service's online databases, the number of currently reported Culturally Unidentifiable Human Remains and Associated Funerary Objects is approximately four times more than the number of currently reported Culturally Affiliated Human Remains and Associated Funerary Objects; and

WHEREAS: The above Indian tribes agree that the NAGPRA and repatriation processes are unacceptably slow and burdensome in their present form.

THEREFORE: The respective federally recognized Indian tribes listed above request the following steps to improve the NAGPRA process:

A)An ombudsman be appointed to work with the Indian tribes and federal agencies to facilitate timely NAGPRA compliance and that four full-time NAGPRA investigators be employed within the Department of the Interior to ensure

that museums, universities, and institutions that receive federal funds comply with NAGPRA; and

B) Seek to improve NAGPRA compliance by increasing the civil penalty amounts; and

C) Federal agencies, in consultation with Indian tribes, shall locate and secure reburial sites on federally protected land to be used by Indian tribes for the reburial of human remains and objects repatriated through the NAGPRA process; and

D) NAGPRA Grants shall support projects that involve consultation with museums, universities, and institutions that receive federal funds and hold federal collections; and

E) Indian tribes be provided with a copy of information that federal agencies submit to the National Park Service for inclusion in the Culturally Unidentifiable Native American Inventory Database, thus creating a process for directly sharing information with Indian tribes; and

F) Develop a NAGPRA tribal consultation policy for sharing information among Indian tribes, federal agencies, museums, universities, and institutions that receive federal funds that would include, but is not limited to, NAGPRA Inventories, Summaries, archaeological reports, and other relevant data; and

G) The Department of Interior shall promulgate the remaining reserved section(s) of the NAGPRA regulations; and

H) Support NAGPRA at the level of at least $1 million for NAGPRA administration, and $4 million exclusively for the NAGPRA grants to Indian tribes and museums; and

I) Federal agencies, museums, and institutions that receive federal funds shall participate in an annual consultation meeting with Indian tribes for the purpose of discussing policy-making, priority-setting, funding resources, and NAGPRA compliance, to be held in Oklahoma, the home of 39 federally recognized Indian tribes

One of the tribal members of OCoT, Ms. Lisa Larue from the United Keetowah Band of Cherokees, recently said these words at one of recent gatherings in Norman, Oklahoma, "It is a shame that some of our ancestors have been in boxes and on shelves for a longer time than they have walked on this earth." The message we want to send about not returning our ancestors to their spiritual journeys is a moral one. We urge that the Congress review our resolution's recommendations and work with us to remove the challenges and barriers to the repatriation process.

Cultural Preservation at the Muscogee (Creek) Nation

In addition to my repatriation duties, I am also the newly designated Tribal Historic Preservation Officer (THPO) for our tribe. The Muscogee (Creek) Nation is the 113th Indian tribe to acquire Sec. 101(d)(2) status as a THPO. The THPO program is in a funding crisis because the amount of federal funds for the program is not keeping pace with the number of tribes entering into the program.

The Muscogee (Creek) Nation's Office of Cultural Preservation had the honor and privilege to assist our sister tribe, the Choctaw Nation of Oklahoma, with its own efforts of repatriation by working together to assist in the return 124 Ancestors. The Choctaw Nation, as the lead tribe, in consultation with other related tribes and the NPS Natchez Trace National Parkway, completed the repatriation process and reburial of the ancestors to allow for the continuation of their journeys to the other world. As the related tribes all acknowledge, there is no ceremony for the reburials but for protection of self, one was agreed upon. This ceremony was not intended for the reburial process but for protection of the workers who handle the remains, dig the graves and walk on the burial ground, much as we have funeral ceremonies in modern times. It was the intertribal collaboration that allowed the use of each of our combined traditions to "invent" new ceremony, to show respect for our relatives. It did not matter that the Human Remains and Associated Funerary Objects belonged to the Natchez people, we as related tribes, had all come to the agreement to allow one of the related tribes, in this case the Choctaw Nation, to make the claim and repatriate. It is important that a related nation return an Ancestor to his or her cultural context—in our case, to the earth in a respectful way. As with all our ceremonies, repatriations are private matters and no one outside of our traditions need to know the details of what we do. This is the case for our religions, cultures and ways of life, just as it is for non-Natives' most personal and private family matters.

To allow Ancestors to find their way home allows us today to Find Our Way Home.

Mr. Chairman and Members of the Committee, allow us to find our way home. This is a responsibility that we choose—to have our select few NAGPRA Warriors take care of our ancestors' remains in the attempt to rectify an injustice that has been perpetuated on the Native Peoples of the Americas. Please remove the barriers that stand in the way of fulfilling our responsibilities.

We urge you to act upon our requests and the attached resolutions, in order to keep repatriation on its intended policy course and to return the federal agencies' implementation of NAGPRA to the positive policy goals of our human rights law.

Attachments

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #PHX-08-069C

TITLE: NCAI Policy Statement on Sacred Places

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the NCAI Human, Religious and Cultural Concerns Subcommittee met during the NCAI 65th Convention and discussed pressing issues and remedies regarding protection of Native sacred places; and

WHEREAS, the Subcommittee considered and wrote a paper, Policy Statement on Sacred Places, which it wishes NCAI to adopt and transmit to the Presidential Transition immediately following the outcome of the 2008 national election; and

WHEREAS, the exact text of the Policy Statement on Sacred Places reads:

As the oldest and largest national organization of American Indian and Alaska Native tribal governments, NCAI is deeply concerned with the respectful treatment and the protection of Native American sacred landscapes. Historically subjected to the devastating systemic destruction of our religious practices and places, we continue to suffer the heartbreaking loss and destruction of our precious few remaining sacred places.

The American Indian Religious Freedom Act (AIRFA) was enacted into law 30 years ago, in 1978, and states that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

However, 20 years ago, in 1988, the Supreme Court ruled that neither AIRFA nor the U.S. Constitution provides a cause of action for Native Americans to defend their sacred places in court. The high court also stated that Congress would need to enact a statute for that purpose, but Congress has not enacted a statutory right of action for tribes to protect their sacred places and site-specific ceremonies.

In two recent decisions, courts have ruled that the Religious Freedom Restoration Act does not protect Native American religious interests at the San Francisco Peaks or Snoqualmie Falls. Other legal instruments -- such as AIRFA, the Executive Order on Sacred Sites (EO 13007), the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) -- often are ineffectively implemented and provide limited legal redress to aggrieved traditional religious practitioners and tribes.

Year after year, sacred landscapes that are integral to the exercise of Indian religions are being destroyed and are under threat by development, pollution, recreation, vandalism and other public and private actions. There is no comprehensive, effective policy to preserve and protect sacred places.

Protecting sacred places is necessary for the survival of traditional religions, cultures and lifeways and our identity and status as sovereign nations. We Native Peoples are required by the tenets of our traditional religions to protect the physical integrity of these places and we call on others to remove legal and other barriers that stand in the way of our spiritual duty of care and protection. We insist on our access to these landscapes, where appropriate and necessary to our lifeways. We seek public understanding and agreement that one use of a place may be not to use it and that some of these places are geophysically delicate and may not support non-cultural usage.

Here are action steps that are needed at this time to protect Native American sacred places:

- **Enact a statutory right of action for tribes to defend sacred places**

Today, there is no federal statute for the express purpose of protecting Native American sacred places. It is time for Congress to enact a right of action for tribes to defend sacred places. Unless tribes can sustain lawsuits, they will not have a seat at federal negotiation tables and agencies and developers will continue to disregard existing consultation requirements. Meaningful consultation and respectful negotiations can obviate the need for litigation. However, if negotiated accords cannot be reached, tribes must be able to protect their holy places in court.

- **Update and Executive Order 13007 and all consultative instruments**

Executive Order 13007 needs to be updated to assure that Native nations have sufficient, ongoing and meaningful opportunities to consult and participate in federal planning and decision-making processes that may affect Native American sacred landscapes and site-specific ceremonies. EO 13007 does not include a cause of action and any codification of it needs to include a specific right of action for legal protection of Native American sacred places. The federal government has failed to assure adequate nation-to-nation dealings with tribes regarding sacred places and needs to begin by updating and strengthening all its tribal consultative instruments.

- **Evaluate and implement specific sacred places policies**

Federal agencies, in consultation with tribal and religious leaders, should evaluate and implement, to the maximum extent possible, policies that would: 1) transfer sacred and culturally significant landscapes back to the tribes with a cultural affinity to them; 2) develop co-management and co-stewardship agreements with tribes to manage areas of religious and cultural importance; 3) prevent development (through withdrawal or other mechanisms) of areas of cultural sensitivity that are located on public lands; and 4) maintain the confidentiality of information pertaining to culturally sensitive places.

- **Establish policy for cultural surveys prior to transfers and permits**

Establish a federal policy to assure that, prior to any transfer or any issuance of permits, a cultural survey is undertaken in consultation with tribes as part of the initial stages of any federally-mandated identification process. This process must affirm the inherent rights of access to and protection of Native Peoples' historic, cultural, holy and sacred places; cultural patrimony; and our ancestors.

- **Strengthen the Native American Graves Protection and Repatriation Act**

The Native American Graves Protection and Repatriation Act (NAGPRA) needs to be strengthened in several ways. First, NAGPRA's definition of "Native American" needs to be technically clarified and returned to its original intent by adding the following italicized words to the existing definition: "Native American" means of, or relating to, a tribe, people, or culture that is *or was* indigenous to *any geographic area that is now located within the boundaries of* the United States. Second, NAGPRA needs increased penalties for violations of burials and burial grounds, human remains and cultural items. Third, NAGPRA needs to be specifically strengthened with tools for improved law enforcement and prosecutions.

- **Protect burial places and ancestors from current threats**

Burial places are also sacred places. At present, there are entities subverting existing laws designed to protect our burial places and our ancestors. These entities include, for example, prominent universities in the University of California system and other federal and federally-assisted educational institutions, museums and agencies. Vigorous enforcement of existing laws and maximum penalties are needed to address these ongoing violations of law, including the failure to recognize the rights of the historic tribes in California, which tribes have standing under the repatriation laws.

- **Appoint Native people to federal land-managing decision-making entities**

Many of the federal land-managing agencies' decisions affect sacred landscapes, tribal ceremonies and the cultural well being of Native people, but Native people do not sit on the key federal land-management committees, boards and panels which make those decisions. Native Americans need to be appointed to those bodies that make and drive policies and decisions in the federal land-managing agencies, especially those that may affect sacred places and site-specific ceremonies.

- **Use and strengthen existing administrative policies and regulations**
Many federal officials have failed to use existing administrative policies and regulations to protect sacred landscapes or to accommodate the ceremonial use of sacred places by tribes, moieties and traditional practitioners. Any policies and regulations that are deemed inadequate for these purposes need to be strengthened, in full consultation with tribes, religious leaders and traditional practitioners. Federal land managers need to provide the means for scientific and cultural experts, as well as other assistance to tribes in the consultative process.

- **Establish discrete processes for sacred places trust easements**
Establish discrete processes for tribes to obtain and hold trust easements to provide access to and protect the physical integrity of sacred places and viewscapes located on public and private lands. Public officials, in consultation with tribes, moieties and traditional practitioners, need to develop co-management or joint stewardship agreements, as well as practical economic incentives for private land owners to enter into sacred places easements. Tribes, moieties and traditional practitioners need to be provided with the means and assistance to obtain and hold easements. The public process must be discrete, efficient and timely, and the Bureau of Indian Affairs process must allow cultural easements in the fee land to trust land process, which it does not do now.

(Note: The NCAI tribal leadership has adopted resolutions which support the action steps above, including Resolution BIS-02-043, *Sacred Lands*, at the Mid-Year Conference, June 2002 in Bismarck, ND, in support of legislation that furthers the protection of sacred lands and sacred places; and Resolution SD-02-027, *Essential Elements of Public Policy to Protect Native Sacred Places*, at the Annual Convention in November 2002 in San Diego, CA.)

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby adopt the language above as the NCAI Policy Statement on Sacred Places and directs its transmittal to the Presidential Transition immediately following the results of the 2008 national election.

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2008 Annual Session of the National Congress of American Indians, held at the Phoenix Convention Center in Phoenix, Arizona on October 19-24, 2008, with a quorum present.

President

ATTEST:

Recording Secretary

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ABQ-10-012

TITLE: Opposition to the New Rule on Funerary Objects Associated with Culturally Unidentified Human Remains

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the NCAI has a long history of supporting repatriation of Native American human remains, funerary objects (both associated and unassociated), sacred objects and cultural patrimony; and

WHEREAS, the Native American Graves Protection and Repatriation Act (NAGPRA) became law in 1990; and

WHEREAS, NAGPRA is first and foremost a Native American human rights law; and

WHEREAS, pursuant to 25 U.S.C. section 3003(a) of NAGPRA, each federal and federally-assisted agency, museum and educational institution is required to compile an inventory that identifies the cultural affiliation of all people and items in its possession; and

WHEREAS, these inventories revealed that more than 126,000 human remains and 800,000 funerary objects associated with those remains were categorized as "culturally unidentifiable;" and

WHEREAS, regardless of whether Native American human remains and associated funerary objects are categorized as "culturally unidentifiable," they are in fact culturally affiliated to contemporary Native peoples, including federally recognized Tribes, non-federally recognized Tribes and Native Hawaiian organizations, and funerary objects often are key to identifying human remains; and

WHEREAS, on March 15, 2010, the National Park Service issued a final rule on the return of "culturally unidentifiable" human remains and associated funerary objects; and

WHEREAS, the final rule provides that "a museum or Federal agency that is unable to prove it has a right of possession . . . to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations" from whose land the remains were removed or which aboriginally occupied the area; and

WHEREAS, the final rule does not mandate return of the funerary objects associated with these human remains, but instead states that a "museum or federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains" (emphasis added); and

WHEREAS, our ancestors' burials are meant to be kept whole and complete, and the deceased person is entitled to keep the objects he or she was buried with, and it is a desecration to break up a burial or to permit a burial to be broken up; and

WHEREAS, even under western property law, objects removed from burials do not become the property of the finder, but remain the property of the deceased and his or her descendents; and

WHEREAS, the original removal of these associated funerary objects and the continued possession of these objects constitute Fifth Amendment takings; and

WHEREAS, federal or federally-assisted agencies, museums and educational institutions, in possession of associated funerary objects, have no right to retain any object taken from a burial unless they can prove a right of possession; and

WHEREAS, the National Park Service has no authority to take any position that allows any federal or federally-assisted entity to retain associated funerary objects to which it has no right of possession, and to do is contrary to the spirit and intent of NAGPRA; and

WHEREAS, any grant of discretionary authority to federal or federally-assisted agencies, museums or educational institutions to keep funerary objects associated with "culturally unidentifiable" human remains violates NAGPRA.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby oppose the rule on culturally unidentified human remains issued on March 15, 2010 to the extent that it does not mandate the return of associated funerary objects; and

BE IT FURTHER RESOLVED, that the NCAI opposes the implementation of section 10.11(c)(4) of the final rule permitting federal and federally-assisted entities to retain associated funerary objects to which they have no right of possession; and

BE IT FURTHER RESOLVED, that the NCAI insists that the National Park Service revise the rule on culturally unidentified human remains to mandate the return of all associated funerary objects to which a federal or federally-assisted entity cannot prove it has a right of possession; and

BE IT FURTHER RESOLVED, that the NCAI believes the National Park Service has the authority to revise the rule to mandate the return of associated funerary objects and urges it to do so immediately before any burials are broken up and desecrated; and

BE IT FINALLY RESOLVED, that this Resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2010 Annual Convention of the National Congress of American Indians, held at the Albuquerque Convention Center in Albuquerque, NM on November 14-19, 2010, with a quorum present.

President

ATTEST:

Recording Secretary

The CHAIRMAN. Thank you very much, Mr. Isham. And so I have some questions for the three of you.

Mr. Macarro, in regards to NAGPRA, how much credibility is traditional tribal knowledge given in comparison to science?

Mr. MACARRO. Well, I think there is some, but in many ways it seems like NAGPRA sets up a fight between science and traditional knowledge. What is unfolding right now with what I referenced, the University of California San Diego battle with the Kumeyaay people and the tribal nations down there I think kind of exemplifies that.

I don't know if anybody else refers to this as the New La Jolla man, but they are really old bones, tens of thousands of years. The discovery of those bones happened I think when they were building the Chancellor's residence there. And the discovery of those bones occurred before NAGPRA.

And so the disposition of those bones has been in dispute. And adjacent to that location where those bones were found. Other bones were found more recently, in the last few years. Those bone were repatriated to one of the Kumeyaay tribes, no problem, no questions, done.

The odd thing is that the same people that are arguing about the initial bones of antiquity, saying those need to be repatriated, too, those are the ones that had the other bones repatriated. So the only thing that is different is the discovery of these before NAGPRA came into existence.

And that is where these committees and these archaeologists are saying these bones are so old we don't know who they be yours, so we are going to hang onto them and there is no Federal law compelling us to hand them over to you.

So never mind that there has been plenty of traditional knowledge and history applied to the situation. And we felt it was important in our testimony to highlight this because this is indicative, we think, of situations throughout with the University of California and the thousands of human remains that they retain.

And that argument is an insidious one. These bones predate you as Indian people on this continent. That flies in the face of the core of our being. We know who we are. We know how we were created.

We know where we are from. And science isn't going to tell us that that is not true. Yet science is saying that.

And so using the application of this culturally identifiable rule allows them to say, okay, these don't belong to you. They are so old we don't know who they belong to. Therefore, they do not have to be repatriated and we can hang onto them generation after generation because somebody might want to study them in 150 years.

The CHAIRMAN. Thank you.

Mr. Wright, your testimony highlighted issues arising from the term culturally unidentifiable that directly impacted your people. What can Congress do to remedy this situation?

Mr. WRIGHT. It needs to reverse the rule. As you can see, this chart shows or the chart previously showed 126,000 human remains are classified or categorized as culturally unidentified.

When we first started raising a question about this term back in 1998, it was reported that there were approximately 87,000 of these collections were categorized as culturally unidentified. Well, you can see that that number has almost doubled, and it will continue to increase, as we see it, because what is not known is what drives science is the intriguing value that is applied with the technology, with the ability to ask the question to the point where it is intelligence.

And so the more questions that are being asked, the higher the intelligence is being raised with regard to scientific theory. And so eventually, we don't see an end with the questioning because they don't know. And as Mr. Macarro has indicated, all of these things that we know are in place, just as the 9,000-year-old collection out in the State of Nevada was known as the Spirit Cave collection. All of those items, the rabbit-skin blankets, the netting, the bark clothing, all of those things were used when John Fremont discovered Pyramid Lake back in 1844.

So cultural continuity is what we call it, and that is what takes us back to the beginning of time. However, those things are being discounted by science, and I don't understand the disconnection between what they are terming culturally unidentified or culturally unidentifiable to what we try to express in regard to our oral histories.

The CHAIRMAN. Thank you, Mr. Wright.

Mr. Isham, the GAO has confirmed twice already that two Federal laws enacted for the benefit of Native American lineal descendants and communities are not working. What resources are available or what should be available to assist tribes during the repatriation process?

Mr. ISHAM. Thank you, Senator. The GAO reports that talk about those shortcomings for identifying the lineal descendancy and those 10 points of cultural affiliation should be realized that they are based on what is called the preponderance of the evidence. And when you stack those up and include things such as oral tradition, linguistic history, and what the people say, again, that is oral tradition, then those should have a larger weight in this, but they are treated as equal at this point.

But we think implementation of it has not been treated equally and more evidence, more of the restriction is placed on the actual written history, so to speak. And of course, we all know as native

people and oral traditions, much of who we are that we know, of where we come from, is part of the oral tradition. And we know that we have been in these places for thousands of years.

And so those sorts of things have not been addressed and put as equal status.

The CHAIRMAN. Thank you.

Mr. Macarro, in your testimony, you encourage the Committee to protect tribal sacred places. Can we do so by amending existing laws? Or would new legislation be required?

Mr. MACARRO. Well, if this is a wish list kind of question, it would be probably new laws. But I don't know how this is going to be done because there are competing world views here that are in play.

One of the fundamental problems is that so many of our sacred sites are off our reservations. They are off tribal lands, strictly speaking or legally speaking. We are fighting a proposed aggregate mine that would destroy part of our creation story just 650 yards off of our western boundary. And it is a mix of State land. It is a mix of privately held land. And this aggregate mine which may or may not be necessary would be there for 75 years.

And in the end, it will come down to a political decision of a board of supervisors. And so it is a matter of persuasion. There is no law compelling them to vote for it or vote against it. And we hope, in the end, that the public health reasons alone will cause them to vote against it.

But you have private property proponents who say, well, you can't tell somebody what to do on their land. And of course, we like that argument when it is applied to us, certainly. So we understand that. But nonetheless, desecration or destruction of our sacred sites off-reservation, just because it is on somebody's private land, doesn't make it right. It is immoral.

And I will continue to tell anybody that that is immoral. There is nothing right about destroying a sacred site just because you own it and you pay taxes on it. It doesn't make it right.

There should be some law in place that prevents those kind of destructions of sacred sites. In Southern California, many of our sacred sites happen to be hills, knolls or mountains, and they happen to be good sources of aggregate rock product, decomposed granite and things like that that people need to build roads or concrete for housing and curbing and the entire fueling of the housing industry, the construction industry comes from the things they destroy.

So it is a conundrum. It is a tough one, but I don't know what the solution is, if there is a solution in law or if it is just people come to some conclusion. One day they wake up and say, okay, we need to stop doing this. But it is wrong and it is immoral and maybe here in the United States we need laws to prevent people from doing wrong things.

So I think both is probably the answer, fundamentally. We need to look at existing laws and tweak those where necessary to accomplish the goals that we can. And if there isn't an existing law that would accomplish those goals, then a new one needs to be drafted. I think NAGPRA is probably a good goal. It went where no law went before in its goals and its loftiness and that kind of broad-

based, long-term thinking I think should be engaged in as well again.

Thank you.

The CHAIRMAN. Thank you very much.

Mr. Wright, can you elaborate on how native peoples are barred from bringing suit to protect sacred sites and why that barrier does not exist for non-natives in the United States?

Mr. WRIGHT. I think for the most part it has to do with the Federal Government's intention to fund projects. It is also involving the Federal process to evaluate impacts, be it environmental; whether a private property owner or a State may initiate a process for constructing a project. And I am saying this in light of project development because it is usually those actions that impact sacred sites. And when those things happen, we are not given the opportunity to file for injunctions, have any ability to legally protect what we believe as sacred.

Normally, what happens is we will be involved with a scoping process and an environmental review process to the point where we can express our concern about a site, but in return in response to the statements made to protect those sites, it is normally mitigated to the point where there will be minimal impacts, but we can never get to the point where there are zero impacts.

And at times, we are reliant on bringing other organizations into a process of disputes on behalf of tribes because a lot of times, as was said earlier, these sites exist within our aboriginal territory, but not within a reservation boundary or ceded lands.

And so a lot of times we have to go outside of the bounds, even to the point of trying to argue that we have a legitimate claim to these sites. Albeit the Indian Claims Commission map is always brought out and laid across the table to indicate that maybe we don't have a right because this line is drawn on the map saying it is outside of the boundaries of your territory.

Again, the legalities of regulatory criteria and regulatory compliance tends to restrict the ability to maneuver legally into a court system.

The CHAIRMAN. Well, thank you very much, Mr. Wright.

Mr. Isham, in order to achieve the goals of NAGPRA, and I am asking for your opinion.

Mr. ISHAM. Okay.

The CHAIRMAN. In your opinion, do you think amendments are necessary?

Mr. ISHAM. Yes. I get confused on the law side of this. I am used to working in the actual trenches of doing this work. And yes, we are in favor of amendments to the law to help fix some things that are a problem with us.

And one of the problems that we have is the definition between is and was in the law. Again, it relates to some of these ideas of antiquity and what is Native American and or what was Native American, and those legislative and administrative fixes that would help alleviate some of those things.

The CHAIRMAN. Well, thank you. I think you know that it was in the 109th Congress that an amendment was proposed to redefine the definition of Native American in NAGPRA. And that

amendment, however, was not passed. I thank you for mentioning that. Maybe we should go back and visit that again.

I want to tell you and tell this third panel as well, thank you very much for your opinions and your responses, because this will help us try to put things together as we move to improve the system. And you can tell what I am trying to do is reach out to the tribes to find out your thoughts on the matter, rather than us looking at it from this side and saying, well, I think this is what they need.

So we have to work together on this, and we would really appreciate your genuine feelings about this, so we can try to improve it. If we need amendments, okay, we try to do it.

My feeling has always been legislation should be the last thing we should do. If we can do it administratively or policy-wise, that will benefit the people.

But anyway, before we get to that point, we want to hear from you on what do you think, and this is what this hearing is all about.

So I really appreciate you all taking your time to come and meet with us and informing us of how you feel about this.

So it is important to remember that how we treat the dead speaks volumes about how we value living.

And I want to thank our witnesses again for participating in today's hearing. We want to work with you as this Committee considers amendments to NAGPRA and the NMAI Act as well. Your thoughtful input will help this Committee work to make sure that the road home (and for me when you say home, wow, coming from Hawaii, home means a lot, and for all of you, too, wherever you are. It has a deep meaning).

So the road home is a timely journey, one that brings peace to the families and communities who live long for the dignity of their relations and life ways to be respected.

And so we look forward to our working together to bring some of these about to improve the quality of life for the indigenous peoples of the United States of America.

So the record will be open for two weeks. And again, mahalo, thank you very much for all of you, besides our witnesses, for coming and your interest in this area that this hearing is about.

The hearing is adjourned.

[Whereupon, at 4:25 p.m., the Committee was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF CLYDE W. NĀMUʻO, CHIEF EXECUTIVE OFFICER, OFFICE OF HAWAIIAN AFFAIRS

Dear Mr. Chairman, Vice-Chairman and Members of the Committee:

My name is Clyde W. Nāmuʻo, Chief Executive Officer of the Office of Hawaiian Affairs (OHA), a quasi-independent state agency, established under the constitution and laws of the state of Hawaiʻi.[1] The statutory mandates for OHA include the following requirements: "[t]o advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians"[2] and "[a]ssessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians."[3] OHA is one of two organizations specifically cited as examples of Native Hawaiian Organizations (NHOs) within the Native American Graves Protection and Repatriation Act (NAGPRA).[4]

Since its enactment in 1990, the NAGPRA has provided a process which has successfully repatriated ancestral remains and cultural objects to claimants for an appropriate final disposition. As the Office of Hawaiian Affairs (OHA) works to fulfill our statutory mandates to advocate for the Hawaiian people, we are honored to participate in the NAGPRA process by engaging in collaborative efforts which support lineal descendants and other NHOs to ensure our cherished iwi kūpuna (ancestral remains) and cultural objects are treated with the utmost respect.

In Hawaiʻi cases where lineal descendants cannot be ascertained, the NAGPRA allows for a broad range of NHOs, including individual family units to request repatriation. This proactive effort to be inclusive has resulted in some conflict as NHOs which meet the general requirements of the NAGPRA are put on the same level as those with demonstrated familial connections to or expertise in the care of iwi kūpuna or cultural objects. In certain cases there are fundamental conflicts between NHOs and federal agencies and institutions then encounter difficulties in determining which NHO has the closest cultural affiliation and repatriation is subsequently delayed. The Hawaiian community recognizes the results and impacts the external appearance of conflict has on the repatriation process and we are currently engaged in initial discussions which seek to foster broader internal agreement and understanding to ensure appropriate claimants step forward to request repatriation and fulfill familial or traditional responsibilities.

The State of Hawaiʻi has established island burial councils (councils) in order to implement state laws which determine the appropriate treatment of ancestral remains and associated burial goods which are under state jurisdiction.[5] The membership of each council includes representatives of each geographic region of an island who are selected from the Hawaiian community because of their demonstrated understanding and knowledge of the traditions, culture, customs and burial beliefs of our people. Councils participate in the NAGPRA process as NHO who give voice to individuals and families who are recognized as lineal or cultural descendants pursuant to Hawaiʻi state law.[6]

In certain cases, OHA has engaged in discussions with other NHOs which have resulted in agreement that all involved would move forward with a "joint request" for repatriation. To be clear, these are specific cases where there is no conflict between those involved and the commitment to work collaboratively to complete repatriation has been clearly expressed to the appropriate agency or institution. A "joint request" is primarily based on recognition that all involved have some level of re-

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[1] Haw. Const. art. XII, §5, Haw. Rev. Stat. § §10–1 to –16.
[2] Haw. Rev. Stat §10–6(a)(4).
[3] *Id.* §10–3(4).
[4] 104 STAT. 3049(11)(C).
[5] Haw. Rev. Stat. § §6E–43 to –43.6.
[6] Haw. Adm. Rules §13–300–35.

sponsibility to see the repatriation completed successfully. Thus, no NHO can be seen, nor does any NHO want to be viewed as the "most appropriate claimant". Unfortunately, a federal agency or institution may view a "joint request" as a competing claim pursuant to the NAGPRA[7], resulting in the ancestral remains or cultural objects being retained until this apparent "dispute" is resolved. It is our hope that some federal guidance on the difference between a competing claim which does involve fundamental conflicts and disputes between NHOs and a "joint request" which is an expressed commitment between NHOs to work collaboratively can be developed in the future.

The NAGPRA has been referenced during international repatriation efforts with institutions and agencies within countries which do not have laws that require the repatriation of ancestral remains and cultural items in their collections. OHA believes that the fact that the NAGPRA exists and has been successfully applied and completed in the United States of America has positively impacted international repatriation efforts and resulted in iwi kūpuna and cultural objects being returned home to Hawai'i from abroad.

OHA believes that the NAGPRA process is of extreme importance to Native Hawaiians. Repatriation efforts can be complex and OHA is committed to encouraging and supporting the effective participation of Hawaiian communities, families and individuals in developing a framework which will build on the lessons of the past and guide the efforts of current and future generations to ensure that NAGPRA achieves the goals of its policies and provides an appropriate and respectful final disposition for our iwi kūpuna and cultural objects.

I appreciate the opportunity to provide testimony on this very important issue to our Hawaiian people.

PREPARED STATEMENT OF ELIZABETH S. MERRITT, DEPUTY GENERAL COUNSEL, NATIONAL TRUST FOR HISTORIC PRESERVATION

Dear Senator Akaka:

The National Trust for Historic Preservation appreciates the opportunity to submit comments on the Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101–601, 25 U.S.C. § 3001 *et seq.,* as a follow-up to the oversight hearing held by the Committee on June 16, 2011.

I. Interests of the National Trust

The National Trust has a long-standing interest in the preservation of our nation's irreplaceable cultural resources. Congress chartered the National Trust for Historic Preservation in 1949 as a private nonprofit organization to "facilitate public participation" in historic preservation, and to further the purposes of federal historic preservation laws. 16 U.S.C. §§ 461, 468. With the continued support of almost 200,000 members nationwide, the National Trust has been involved in helping federal, state, and local agencies to effectively address and resolve issues affecting cultural resources for more than 60 years. In addition, the Chairman of the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, which is responsible for assisting other federal agencies in complying with Section 106 of the National Historic Preservation Act. See id. §§ 470i(a)(8), 470s.

The National Trust has been actively involved for decades in efforts to protect cultural resources and traditional cultural properties. Many of our constituents are tribes and individuals involved in the repatriation of Native American human remains and cultural objects. The National Trust is particularly concerned about repatriation and the protection of burial sites given the prevalence of looting and vandalism that occurs on public lands and within traditional cultural properties.

These and a variety of other threats facing traditional cultural properties have often placed some of the nation's most critical sites on our annual list of America's 11 Most Endangered Historic Places, based on nominations from tribal members. Most recently, we included Bear Butte in South Dakota and the Greater Chaco Landscape in New Mexico on our just-announced 2011 List of America's Most Endangered Historic Places, as well as P†gat in Guam, which was listed in 2010, and Mount Taylor in New Mexico, which was listed in 2009.

The National Trust respectfully requests that you and the Committee consider the following recommendations:

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[7] 25 USC §3005(e).

II. Culturally Unidentifiable Human Remains and Associated Funerary Objects

In March 2010, regulations on "culturally unidentifiable human remains" were issued by the Department of the Interior. However, the regulations did not require the repatriation of funerary objects together with the human remains with which they were associated. The Department of the Interior's policy was based on an interpretation of NAGPRA which assumes that the Department does not have the legal authority to require this.

During the June 16, 2011 oversight hearing, the Honorable Mervin Wright, Vice Chairman of the Pyramid Lake Paiute Tribe, testified that the March 2010 rule failed to meet the policy goals of NAGPRA. He stated:

> "The traditional burial is inclusive of everything in a funerary process, as well as everything in the grounds or in caves or on scaffolds at the site . . . . In the end, the tribes could receive the human remains, while museums keep the funerary objects, which they can sell, trade, or deal away, irrespective of the policy goals of repatriation laws. It creates a public policy that grave robbing of objects is acceptable . . . ."

Recommendation: Congress should clarify the intent of the statute through a technical correction to require the joint repatriation of culturally unidentifiable human remains together with associated funerary objects. The repatriation of culturally unidentifiable human remains—along with associated funerary objects—is consistent with NAGPRA and with Congressional intent.

III. Ancient Remains

NAGPRA defines "Native American" human remains as remains "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). In *Bonnichsen v. U.S.,* 357 F.3d 962 (9th Cir. 2004), the Court ruled that Native American remains are only those that bear some relationship to a *presently existing* tribe, people, or culture." The interpretation adopted by the court in the *Bonnichsen* decision would render ineffective numerous sections of the Act, such as 25 U.S.C. § 3002(a)(2)(C) (claims based solely upon aboriginal occupation), and 25 U.S.C. § 3006(c)(5) (disposition of culturally unaffiliated remains).

Recommendation: Congress should clarify the intent of the statute through a technical correction to the definition of "Native American" so that the definition would read "of, or relating to, a tribe, people, or culture that is *or was* indigenous to the United States" (emphasis added).

IV. Disposition of Unclaimed Cultural Items

"Unclaimed" cultural items have been defined by the National Park Service as "Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony excavated or discovered on Federal or tribal lands after November 16, 1990 and not claimed under section 3(a) of the Act (25 U.S.C. § 3002(a))." In the final regulations, the Department responded to Comment 14 and stated, "[a] proposed rule regarding the disposition of unclaimed cultural items is currently under development (43 C.F.R. § 10.7)." 75 Fed. Reg. 12,382 (Mar. 15, 2010) *(Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains).*

Recommendation: The Committee should direct the National Park Service to provide Congress with more information on the proposed timeline for the rule regarding the disposition of unclaimed cultural items, and how soon the public will have an opportunity to comment on it.

V. Increased Funding for NAGPRA Grants

Despite contrary testimony by Ms. O'Dell from the Department of the Interior during the June 16 oversight hearing, NAGPRA grants are severely underfunded, particularly with regard to grants requested by indigenous peoples within the United States. Many of these prospective grantees lack the financial and staffing resources necessary to conduct consultations and repatriations.

Recommendations: (A) Congress should provide additional funds for NAGPRA grants, repatriation, and technical assistance programs that will help advance the full implementation of NAGPRA and the repatriation process. Since there has been a steady increase in NAGPRA grant requests over the years, Congress should provide adequate funds to meet the growing need for NAGPRA consultation/documentation grants and NAGPRA repatriation grants to ensure timely and adequate compliance.

(B) Congress should provide additional, separate funds for federal agencies so that these agencies seeking financial assistance for repatriations are not competing with

the tribes for already oversubscribed grant funds that should be exclusively for the tribes.

VI. Oversight and Enforcement of Repatriation by Federal Agencies

The GAO Report admonished several federal agencies for failing to complete inventories, provide notice of human remains and other cultural items to tribes, and repatriate such items. A second GAO report also documented the slow rate of repatriations by the Smithsonian museums.

Recommendation: Congress should provide strong oversight of federal agencies, such as the Tennessee Valley Authority and the Smithsonian, to ensure that the agencies prioritize their repatriation programs and efforts.

VII. International Repatriation

An estimated 1 to 2 million human remains, funerary objects, sacred objects, and objects of cultural patrimony currently reside in international repositories. While the NAGPRA applies to federally funded institutions within the jurisdiction of the United States, it currently does not extend internationally. These ancestral remains and cultural objects left tribal lands through grave robbing, explorers, scientists, anthropological studies and archaeological excavations, war, and the sale and trade with U.S. institutions, such as the Smithsonian. Foreign collections continue to obtain items through markets that deal internationally in the trade of Native American human remains and cultural items, many of which could not legally be sold in the United States.

In December of 2010, President Obama signed the U.N. Declaration on the Rights of Indigenous peoples, which supports the repatriation of human remains and cultural items:

> *Article 12.* Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Currently, only a few international repatriations have occurred from international repositories to tribes, who are often overwhelmed by the process due to lack of resources. Many of these international repatriations have taken an excessive amount of time, some upwards of 20 years, and others have been abandoned because of financial constraints and staffing limitations.

Recommendations: (A) The Committee should investigate the growing need for international repatriation among tribes and assess international models for repatriation (for example, the Museum of New Zealand Te Papa Tongarewa and the Australian Government's International Repatriation Program).

(B) The Committee should develop legislation that would: (1) provide funds for indigenous communities in the United States to research, consult, and repatriate internationally; and (2) penalize the international exportation and trafficking of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Thank you for the opportunity to provide testimony to the Senate Committee on Indian Affairs on these very important issues.

PREPARED STATEMENT OF JACK F. TROPE, EXECUTIVE DIRECTOR, ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Dear Senator Akaka:

The Association on American Indian Affairs (AAIA) appreciates the opportunity to submit comments on the Native American Graves Protection and Repatriation Act (Pub. L. 101 -601, 25 U.S.C. 3001 et seq., 104 Stat. 3048) and repatriation in general. There are several issues pertaining to repatriation that the AAIA believes should be reviewed, including: 1) clarifying that the Secretary of Interior has the authority to issue regulations concerning culturally unaffiliated funerary objects; 2) inserting "or was" into the statutory language of 25 U.S.C. § 3001(9) to ensure ancient remains are covered by NAGPRA; 3) increasing funding for NAGPRA grants, particularly tribal grants; 4) ensuring that federal agencies, including the Smithsonian, come into compliance with NAGPRA through enhanced oversight and extra resources to the extent possible; and 5) investigating the need for and identify obstacles to international repatriation, develop anti-trafficking legislation, and provide resources to ensure that the provisions in the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) regarding repatriation can be more fully realized.

I. Interests of the Association on American Indian Affairs.

The Association on American Indian Affairs has been working for 89 years to promote the goals and interests of Native American peoples to live happy, healthy and productive lives. The AAIA has an all-Indian Board of Directors from across the country. Our current projects focus in the areas of cultural preservation (sacred lands protection, repatriation and Native language preservation), youth/education (scholarships, Indian child welfare advocacy), health and federal recognition of unrecognized Indian tribes.

The AAIA was integrally involved in the development of the Native American Graves Protection and Repatriation (NAGPRA) and one of the main proponents of the repatriation provisions in the NMAI Act. NAGPRA was a huge step forward in terms of repatriation efforts in the United States, although we believe that repatriation needs to eventually include private collections and international collections. The Association on American Indian Affairs' current International Repatriation Project is one of the first large-scale, multi-community efforts in the country to investigate this growing issue of concern among indigenous communities in the United States.

II. Culturally Unidentifiable Funerary Objects

In March 2010, the Department of Interior issued regulations on culturally unidentifiable human remains. Although repatriation of culturally unidentifiable funerary objects is recommended, it is not required that they be repatriated. This is based upon an interpretation of NAGPRA whereby the Department of Interior concluded that it did not have the legal authority to require this.

RECOMMENDATION: Congress should consider a technical amendment that would clarify that the Department of Interior has the authority to require repatriation of culturally identifiable and unaffiliated funerary objects.

III. Ancient Remains

NAGPRA defines "Native American" human remains as remains "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). In *Bonnichsen v. U.S.*, 357 F.3d 962 (9th Cir. 2004), the Court ruled that Native American remains are only those that bear some relationship to a *presently existing* tribe, people, or culture" The *Bonnichsen* decision is highly suspect as a matter of law given that it would render numerous sections of the Act virtually superfluous, e.g., 25 U.S.C. 3002(a)(2)(C) (claims based solely upon aboriginal occupation), 25 U.S.C. 3005(a)(5) (disposition of culturally unaffiliated remains).

RECOMMENDATION: Pass technical legislation adding "or was" to the statutory language so that the definition of "Native American" will read "means of, or relating to, a tribe, people, or culture that is *or was* indigenous to the United States" (emphasis added).

IV. Increased Funding for NAGPRA Grants and Oversight of Federal Agencies

The National Park Service has been unable to fund a large portion of the grants requested by indigenous peoples within the United States, many of whom lack the financial and staffing resources necessary to conduct consultations and repatriate. In addition, according to the GAO Report, several federal agency collections have not completed inventories, provided notice of

human remains and other cultural items to tribes, and/or repatriated such items. Moreover, a separate GAO report documented the relatively slow pace of repatriations by the Smithsonian.

RECOMMENDATION: Congress should allocate additional funds for NAGPRA Grants and repatriation and technical assistance programs that will help advance the full implementation of NAGPRA and the repatriation process. It should also provide strong oversight of federal agencies, such as the Tennessee Valley Agency and the Smithsonian, to ensure that the agencies prioritize their repatriation programs and efforts.

V. Repatriation to Tribes that are not Federally Recognized

The recently adopted regulations acknowledge that some of the so-called "culturally unidentifiable remains" may be culturally affiliated with tribes not recognized by the federal government. The regulations permit repatriations to be made to such groups, but do not require them. These dispositions may take place only if, after consultation, no federally recognized tribe that could make a claim based upon the culturally unidentifiable regulations objects and the Secretary of Interior or his designee so recommends. This is an improvement from earlier drafts of the regulations which required affirmative consent from all federally recognized tribes before such a repatriation could take place, but still creates a considerable obstacle to repatriation by non-federally recognized tribes.

RECOMMENDATION: We request that Congress ask the Secretary of Interior to reconsider this part of the regulations. We believe that where cultural affiliation can be shown that this should take priority. For example, if a federally unrecognized tribe such as the Mattaponi or Houma can show cultural affiliation and no federally recognized tribe can make such a showing, we see no reason why the Houma or Mattaponi should not be able to repatriate those remains which have been classified under the statute as "culturally unidentifiable".

VI. International Repatriation

An estimated 1 to 2 million human remains, funerary objects, sacred objects and objects of cultural patrimony currently reside in international repositories. These human remains and cultural objects have ended up in international repositories as a result of actions by explorers, scientists, various anthropological studies and trades or sales with U.S. institutions, such as the Smithsonian. Foreign collections continue to obtain items through markets that deal internationally in the trade of Native American human remains and cultural items, many of which could not legally be sold in the United States.

While the NAGPRA applies to federally funded institutions within the jurisdiction of the United States, it currently does not extend internationally. In December of 2010, President Obama signed the U.N. Declaration on the Rights of Indigenous peoples, which supports the repatriation of human remains and cultural items:

> Article 12 Indigenous peoples have...the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains...States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair,

transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

To date, only a handful of international repatriations have occurred and tribes are often overwhelmed by the difficult process of repatriating items internationally.

RECOMMENDATION: The AAIA requests that Congress take a closer look at this growing need for international repatriation among tribes, fully assess the issues surrounding international repatriation and allocate funds for indigenous communities within the U.S. to research, consult and repatriate internationally. In addition, the AAIA requests that Congress look into creating legislation that will prevent the illegal international trafficking of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

Thank you again for the opportunity to submit comments and for your consideration of this testimony.

PREPARED STATEMENT OF JOHN W. MCCARTER, JR., PRESIDENT/CEO, FIELD MUSEUM OF NATURAL HISTORY

Dear Senator Akaka:

On behalf of the Field Museum of Natural History, thank you for holding the June 16, 2011, "Oversight Hearing on Finding Our Way Home: Achieving the Policy Goals of NAGPRA." We deeply appreciate the Senate Committee on Indian Affairs' attention to the implementation of the Native American Graves Protection and Repatriation Act ("NAGPRA" or the "Act"). You stated in your opening remarks that the issue is so important that the Committee would like to hear from everyone, and for that reason, the Hearing will be open for two weeks for the submission of written testimony. We are pleased for the opportunity to be heard through written testimony, but we are deeply disappointed and concerned that no museum was invited to testify. While we recognize that the Smithsonian Institution was represented at the Hearing and appreciate the valuable comments made by Mr. Gover, it is significant that the Smithsonian is subject to the National Museum of the American Indian Act ("NMAIA"), not to NAGPRA. Therefore no museums that are subject to NAGPRA were represented at the Hearing. This is fundamentally troubling because the Act itself is specifically worded to strike a balance among the many diverse groups affected – including not only Federal agencies and Indian tribes, but also museums and scientific organizations.

From the first efforts to craft national repatriation legislation, central to that effort has been a respect for the human rights of Native Americans, but also for the values of scientific research and public education. The Senate explicitly recognized "the important function museums serve in society by preserving the past to educate the public and increase awareness about our country's history" (Senate Report 101-473, at 4), and specifically intended NAGPRA to "reflect an understanding of the important historic and cultural value of the remains and objects in museum collections" (Id.). NAGPRA is specifically worded to reflect this balancing of interests, and museums are a vital component of that balance. Museums should be represented at the witness table whenever NAGPRA is considered by Congress.

The Field Museum of Natural History is subject to NAGPRA as an institution that receives Federal funds. The Field Museum and its staff have been active participants in the NAGPRA process since its inception: as a Panel Member on the 1989 National Dialog on Museum/Native American Relations, providing testimony during the Congressional hearings, as an early member of the NAGPRA Review Committee,

through multiple submissions of written comments on the regulations, as a recipient of numerous National NAGPRA Program consultation grants, and most importantly, as a participant in many consultations and repatriations with Indian tribes, Native Hawaiian organizations and Alaska Native villages.

We acknowledge that the primary purpose of the June 16, 2011 Oversight Hearing was to address the recent Government Accountability Office reports on NAGPRA compliance by Federal agencies, including the National NAGPRA Program, and NMAIA compliance by the Smithsonian Institution. However, the Hearing touched on issues of special significance to museums, most notably, the Committee's interest in possible amendments to the Act. If Congress is to consider any amendments to the Act, we specifically ask that it address the disposition of culturally unidentifiable human remains.

As you are no doubt aware, on March 15, 2010, the Secretary of the Interior published regulations on the disposition of culturally unidentifiable human remains (43 C.F.R. § 10.11). We believe that in doing so, the Secretary exceeded his legal authority and that these regulations must be withdrawn. In passing NAGPRA, Congress created a process for the *repatriation* of Native American human remains that can be *culturally affiliated* to a present-day Indian Tribe. As we have stated in our previous public comments (attached), the Section 10.11 regulations create a new process for the *disposition* of *culturally unidentifiable* human remains that is distinct and separate from the Act's repatriation process for culturally affiliated human remains.

The only language in NAGPRA that addresses the disposition of culturally unidentifiable human remains is the charge to the NAGPRA Review Committee to: (i) compile an inventory of culturally unidentifiable human remains in the possession and control of museums and Federal agencies; and to (ii) recommend specific actions for developing a process for disposition of such remains (25 U.S.C. 3006(c)(5)). These clearly are instructions for the Review Committee to make recommendations to Congress for possible future legislative action. The House Report on NAGPRA indicated as much, stating, "The Committee looks forward to the Review Committees [sic] recommendations in this area" (H.R. Rep. No. 101-877, at 16). The Review Committee provided its final recommendations to Congress in 2000 (65 F.R. 36462-36464)("Recommendations"), but as of yet, Congress has not chosen to act upon them. The Field Museum is not opposed to a process for the disposition of culturally unidentifiable human remains – we believe such a process is for Congress to establish, not the Secretary of the Interior.

Further, the new regulations on culturally unidentifiable human remains create significant legal exposure for museums, as they provide museums no protection from claims for breach of fiduciary duty, public trust, or violations of state law for their good-faith dispositions of culturally unidentifiable human remains. This result is contrary to both the language and intent of the Act. As enacted, NAGPRA limits the liability of "any museum which *repatriates* any item in good faith." 25 U.S.C. § 3004(f) (emphasis added). While the Act does not define "repatriation," the clear intent is to protect museums from claims arising out of their good-faith compliance with the terms of the Act.

In contrast to NAGPRA, the new regulations exclude culturally unidentifiable human remains from the § 3004(f) liability shield through the new definition of "disposition." According to the new regulations, "disposition" means the transfer of control over Native American human remains, etc., by a museum or Federal agency. The new regulations distinguish the *repatriation* of culturally affiliated human remains (*see* 43 C.F.R. 10, § 10.2(g)(5)(ii)) from the *disposition* of culturally unidentifiable human remains (*see* 43 C.F.R. 10, § 10.2(g)(5)(iii)). Under the Final Rule, it is clear that the disposition of culturally unidentifiable human remains is not a repatriation. The effect is that a disposition of culturally unidentifiable human remains, even in good faith and in accordance with the Act and regulations, is not protected by § 3004(f) because a disposition does not qualify as a repatriation. Through its definitional provisions, the new regulations have effectively opened museums up to unlimited potential liability for their determinations on culturally unidentifiable human remains. Given that dispositions of culturally unidentifiable human remains are more likely to create uncertainty and competing claims, it is untenable and unacceptable for museums not to be provided the same protection from liability that is granted for the repatriation of culturally affiliated human remains. We question whether the Secretary can even remedy this through regulatory revision, as we believe only Congress, not the Secretary, can provide museums protection from legal claims for actions taken pursuant to the Act.

As Mr. Gover noted in his testimony, the real irony is that the required disposition of culturally unidentifiable human remains under the Section 10.11 regulations will preclude any later finding of cultural affiliation when scientific advances and continued consultation could enable such determinations to be made. The Section 10.11 regulations require museums to offer to transfer control or be subject to civil penalties, when instead time should be allowed to conduct the necessary consultation and research that could allow human remains to be returned to the proper descendants. The Field Museum has in fact through continued research and consultation affiliated and repatriated human remains that initially were listed as culturally unidentifiable. Where such determinations cannot be made, Congress has affirmed that museums serve as appropriate repositories for human remains. If any amendments are to be made to the Act, we ask that Congress pay particular attention to the new Section 10.11 regulations on culturally unidentifiable human remains and take steps to restore the balance that has been lost through the actions of the Secretary and the National NAGPRA Program.

Thank you for your time and consideration.

PREPARED STATEMENT OF LEO STEWART, INTERIM CHAIR, BOARD OF TRUSTEES, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

Dear Senator Akaka:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) would like to express our appreciation to the Senate Committee on Indian Affairs (SCIA) for their continued attention and oversight of the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). NAGPRA was hard-fought-for legislation that represented a reversal of long-standing policy addressing the human rights of tribes to protect the graves of our ancestors. The CTUIR has commented in the past regarding recommendations for improving the law and we stand by those earlier recommendations. This letter is intended to offer our support and additional suggestions for implementation of NAGPRA.

The CTUIR also appreciates the report and work of the Government Accountability Office (GAO) in reviewing the implementation of NAGPRA. I doubt if we anticipated twenty years ago when NAGPRA was passed exactly how long it would take to implement the law, but effective implementation is certainly hastened by oversight by the GAO and SCIA. However, because there is no federal agency or entity responsible for full-time enforcement and oversight of NAGPRA implementation the law is likely going to remain a problem for enforcement. There is, of course, the NAGPRA Review Committee which hears disputes, but such a formal process is only available to tribes with the resources to pursue such disputes. Further, without an agency to handle enforcement, there is the risk that truly recalcitrant museums might just fall through the cracks. We have claims with museums which have been pending for some time, and the only practical alternative is the dispute resolution process through the Review Committee. That takes time and money, however, and that money can be better spent working with cooperative museums. Our experience indicates that some non-cooperative museums both understand and count on this.

NAGPRA entrusts oversight and enforcement with the Secretary of the Interior alone. The law does not give any additional authority over other federal departments nor the necessary authority to create an enforcement arm within the Department of the Interior to carry out this responsibility. While the National NAGPRA Office oversees the implementation of the law, it has no authority to investigate or resolve NAGPRA non-compliance issues and only advisory authority over agency compliance. A new or existing agency with specific enforcement authority over NAGPRA would, in our opinion, assist and hasten the proper implementation of NAGPRA. As NAGPRA lacks an enforcement mechanism for

agencies or any penalties for failure to comply for those agencies, NAGPRA compliance is a discretionary and largely unfunded mandate. A single federal entity reviewing enforcement of NAGPRA could also work with other federal agencies and museums to identify deficiencies as well as successes.

Independent of an oversight entity, GAO may undertake a review of museum compliance with NAGPRA. Obviously this is a daunting task with the many entities that fit the definition of "museum" under NAGPRA, but if a few large, representative museums could be selected for review at the outset, the issue of museum compliance would receive more meaningful scrutiny that the tribes do not always have the ability to provide. Each museum has its own repatriation committee with varying degrees of effectiveness and bureaucracy. Each museum also has its own level of certainty required to find "cultural affiliation" under NAGPRA. It would be helpful to know what works for museums as well as what does not work. The CTUIR tends to only see the end product, the letter determining cultural affiliation, or the endless letters requesting additional evidence, evidence that is often only in the possession of the museums themselves. It will take a long time to identify all museums subject to NAGPRA, and much longer still to determine the degree to which they are following the law, but until this is done we will not know if NAGPRA has accomplished its purposes.

Funding remains a critical issue for NAGPRA implementation. We have previously noted that NAGPRA grants only go so far and can cover the documentation and repatriation, but do not cover the background research to identify the remains at the outset prior to the initiation of consultation. The CTUIR has suggested a line-item within the Department of the Interior Bureau of Indian Affairs budget to fund tribes either directly or through the P.L. 93-638 Self-Determination contracting process to do NAGPRA work. Such a funding mechanism would greatly aid tribes with minimal resources in pursuing repatriation of tribal ancestors. Recently the economic climate has forced us to reduce staff that handle NAGPRA issues, causing delays and reducing the number of repatriations. We will continue to work with NAGPRA, but more work will have to be spread out among fewer staff.

The CTUIR has a lot more work to do to get our ancestors home. There are dozens if not hundreds of museums who may potentially have CTUIR ancestors in their collections, so pervasive was the distribution of Native American human remains. Since the regulations for the disposition of culturally unidentifiable human remains were issued last year we have not gone through this process to repatriate. However, as the GAO report concluded, the Culturally Unidentifiable Database is only as useful as the data put into it and some of that data is incomplete or inaccurate. We can not know how many remains that would have been determined to be Native American before the Kennewick Man decision have been unilaterally determined by museums to be non-Native American without consultation.

In conclusion, we hope that this letter does not convey an excessively bleak outlook for the future of NAGPRA. On the contrary, we have found that our successes in NAGPRA far outnumber our failures or obstacles. We have repatriated hundreds of tribal ancestors and thousands of both associated and unassociated funerary objects. We anticipate that the final issuance of the regulations for the disposition of culturally unidentifiable human remains will hasten further repatriations and we are thankful those regulations were issued. Most museums work well with us and if the consultation starts on a cooperative foundation we can have an enormously positive relationship as museums return human remains for rightful burial and we reunite our ancestors with their homeland. This success stands in

contrast to the various instances where agencies have failed to comply with the Endangered Species Act, National Environmental Policy Act, or and other federal laws, resulting in endless lawsuits and perhaps eventual compliance. NAGPRA compliance for federal agencies unfortunately remains discretionary, and thus justice is not always achieved.

Thank you again for your continued attention to the appropriate implementation of NAGPRA. It may take many more years to complete, but each repatriation is a step closer to bringing all of our ancestors home.

PREPARED STATEMENT OF MATTHEW WESAW, CHAIRMAN, POKAGON BAND OF POTAWATOMI INDIANS

Dear Chairman Akaka:

On behalf of the Pokagon Band of Potawatomi Indians, I would like to submit this testimony to the Senate Committee on Indian Affairs as you review the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). We want to commend the Committee for taking an interest in this most important issue.

The Pokagon Band of Potawatomi Indians of Southwest Michigan and Northwest Indiana are headquartered in Dowagiac, MI and has resided in this area for several hundred years with various villages scattered throughout the St. Joseph River Valley. Their namesake, Leopold Pokagon, helped negotiate the Treaty of Chicago 1833 and, according to the sub-articles of said treaty, insured his people's stay in Michigan while others were removed to Kansas and Iowa. Since that time, Pokagon's Band has retained not only their physical presence in the area, but their cultural presence as well. Their federal recognition status was restored in September of 1994.

In part with keeping with cultural practices, NAGPRA related responsibilities are of great concern for the Band and in the 21 years since the inception of NAGPRA, there have been several issues that the Band has faced. In dealing with various institutions, some have proven to be more engaging than others on a national front, but many of the more local institutions have not been so. In the state of Michigan, the Pokagon Band is aware of several institutions with holdings pertaining to the Band from within both traditional and contemporary territories. Several of these institutions have failed to engage in the consultation process, ergo repatriation and disposition has been somewhat difficult. With the passing of 43 CFR 10.11, several of those institutions are now willing to engage, but it is still a slow process.

In terms of dealings with specific institutions, the University of Michigan and Western Michigan University have been problematic for the Band for various reasons. For years, John O'Shea and various other administrative bureaucrats at the University of Michigan have acted as a "road-block" to repatriation and disposition efforts. However, times and faces have changed and the Office of the Vice President for Research, headed by Stephen R. Forrest, have proven to be much more accommodating in engaging with the tribes on these issues. The institution recently accepted a joint claim for all CUHR's and AFO's, (Culturally Unidentifiable Human Remains and Associated Funerary Objects), by the tribes in Michigan for those remains and funerary objects that were taken from sites in the state of Michigan currently held by the University of Michigan Museum of Anthropology. This would not have been possible with the likes of John O'Shea being involved in the process. With Western Michigan University, there was simply no real way for the Band to attempt to engage in consultation because Western never generated an inventory of their holdings until more recent times. For 30 years or more, items donated to or found by Western's Anthropology department were simply tossed in a basement with the faunal remains and kept as a sort of "treasure trove" for research. They have since taken steps to rectify this; however, they still have a long way to go, as do all institutions.

The Band would like to make a couple suggestions for changes that could improve NAGPRA and perhaps better streamline the process for repatriation and disposition. The Band would like to see more clearly defined time tables with respect to listing notices on the National Register and that DNA samples and imagery originally generated by the institutions relating to human remains, funerary objects, objects of cultural patrimony, and sacred objects be included with repatriations and dispositions explicitly as well.

These are critical issues for Tribes like the Pokagon Band which seek to use NAGPRA as a meaningful tool in the repatriation and disposition of our ancesteral items. We believe it is important for the Congress to maintain vigilance on the current implementation of NAGPRA to ensure that Tribal Governments are treated within the intent and meaning of the law.

Thank you for taking your time to review our testimony and your oversight on the NAGPRA issues. We are willing to assist you and the Senate Committee on Indian Affairs on this most important matter. Please feel free to contact us if you have any questions.

PREPARED STATEMENT OF GEORGE THOMPSON, MEKKO, OCEVPOFV CUKO RAKKO (HICKORY GROUND CEREMONIAL GROUND)

The Hickory Ground Tribal Town of the Muscogee (Creek) Nation appreciates the opportunity to submit this statement before the closing of the record on the hearing of the Native American Graves Protection and Repatriation Act (NAGPRA) on June 16, 2011. The historic site of Hickory Ground near Wetumpka, Alabama is being threatened with destruction by development at the site.

We are direct lineal descendants of the historic Ocevpofv Cuko Rakko (Hickory Ground Ceremonial Ground) etvlwa (Tribal Town), a constituent of the Muscogee Confederacy and present-day Muscogee (Creek) Nation of Oklahoma. The struggle to protect our ancestors and associated objects buried in our traditional aboriginal territory in Alabama is particularly difficult for "removed tribes" such as ourselves who are now located in eastern Oklahoma.

While the Creek Nation is commonly referred to as a "tribe," the term "confederacy" is historically and politically correct as is shown by the various treaties and Acts of Congress, judicial opinions and administrative rulings identifying it as a "confederacy consisting of tribes, bands or towns." *Cf* Cohen's Handbook of Federal Indian Law 437, n.87(1941 Ed.). The Creek Nation Confederacy is believed to have existed in political form as early as 1540, according to *John R. Swanton, The Social Significance of the Creek Confederacy Proceedings of the Nineteenth International Congress of Americanists* 331 (Washington, DC) (Dec. 27–37, 1917).

Hickory Ground Tribal Town is one of 44 original towns that were removed from homeland settlements in Alabama and Georgia during the removal era in the 1830's. Sixteen (16) towns still have an active fire with the ceremonies and social structure of the ancient towns being maintained today.

In support for the leaders of the Ocevpofv Cuko Rakko, the Muscogee (Creek) Nation passed a law in 2006, NCA 06–185. It is titled "A Law of the Muscogee (Creek) Nation Clarifying the Position of the Muscogee (Creek) Nation on the Protection of the Muscogee Cultural and Historical Site of Hickory Ground near Wetumpka, Alabama and Authorizing a Special Appropriation for the Cost of Necessary Measures Required to Secure and Protect the Site and/or Cause Commercial and Gaming Activity to Cease.

The Declaration of Policy for Muscogee (Creek) Nation is stated in this Act to:

> A. Protect cultural sites, whether historic or pre-historic, within those lands occupied by peoples who became the constituent Tribal towns of the Muscogee Confederacy and
>
> B. Protect the sanctity of all burials of Muscogee peoples, based upon the Muscogee common law that a burial is a permanent resting place for the dead.

In further support, the traditional leaders (Mekkos) signed a precedent setting document for modem times proclaiming unity among the signatory Tribal Towns to preserve our burial grounds, mounds and sacred sites, most located in Alabama, Georgia and Florida. (Attachment 1.)

Cause of Action and Injunctive Relief

In order to protect our burial grounds and grave goods, mounds and places of cultural patrimony, NAGPRA does not provide us with a right of action and injunctive relief when destruction and desecration of these sites occur. This is particularly difficult when the lineal descendants are far removed from its aboriginal territory. Moreover, the lineal descendants in traditional tribal towns are grassroots people hampered by little or no funding in order to aggressively monitor ancient sites and burials.

The difficulty is when another Tribe moves into an area that is not its aboriginal area. At the Hickory Ground site the current tribal owner was given title under grants from the Alabama Historical Commission to preserve the historic site, but instead, conducted excavations removing human remains and storing funerary objects at a state University. Hickory Ground Tribal Town descendants are unable to require another Tribe to re-inter their ancestors with the correct funerary objects now stored at a University. Development of the site is ongoing. As of today, 56 remains that have been removed from graves are wrapped in newspapers and stored in buckets separated from their associated funerary objects.

A right of action to seek injunctive relief is not available under NAGPRA. NAGPRA should be amended to facilitate original objectives of the law.

Museum Compliance With Inventories

Hickory Ground Tribal Town and Muscogee (Creek) Nation representatives have been unsuccessful in their attempts to work with the National NAGPRA Program

in their efforts to obtain an inventory of human remains and objects removed from Hickory Ground and in possession of a University under a contract from the local Tribe.

According to NAGPRA and noted in the recent GAO Report, federal agencies and museums are required to compile an inventory of any holdings or collections of Native American human remains and associated funerary objects that are in its possession or control. Additionally, as noted by the GAO, NAGPRA requires these agencies and museums to prepare a written summary of any holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony in its possession or control, based on the available information in their possession.

Hickory Ground Tribal Town members wish to protect the ancestors in a manner befitting the Town's historical and cultural place of honor. This includes requiring burials to remain intact with all associated funerary objects.

Under Tribal law NCA 06–185, the Nation particularly states in Section 1–102, Declaration of Policy:

> 'P. Burials are not real property, and the ownership of a burial does not transfer to the owner, possessor, lessor or lessee of real property or the mineral or subsurface interest in real property as does the ownership of a fossil, because a fossil is an artifact of nature and its location in real property is the result of natural forces, but a burial is a human structure which was intended from its beginning to never be disturbed."

This Tribal law reflects many similarities in United States common law that addresses human remains and the rights of landowners and lineal descendants. In our recent discussions with the National NAGPRA Program seeking clarification on the matter of human remains and property laws, it would appear that National NAGPRA's interpretation is that of owner of the property is also owner of the graves on the real property. Among the purposes of NAGPRA was to account for and address those unique situations in Native American history that were not covered in the common laws such as forced removals and to provide equal protection for graves and religious rights protected under the First Amendment.

NAGPRA defines "possession" as

> "having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects, or objects of cultural patrimony on loan from another individual, museum, or Federal agency" [43 CFR 10.2 (a)(3)(i)]

As stated in the GAO Report NAGPRA defines a federal agency as any department, agency, or instrumentality of the United States, except the Smithsonian Institution, and defines a museum as any institution or state or local government agency, including any institution of higher learning, that receives federal funds and has possession of, or control over, Native American cultural items, except the Smithsonian Institution. Museums, archeological centers, laboratories or storage facilities that are managed by a university, college, museum, or other educational or scientific institution would be considered to be included in NAGPRA compliances.

In the case of the Hickory Ground human remains and funerary materials that are at a state university that receives federal funding, it would seem that the thresholds for "possession" and "legal interest" have been met. Tenured professors and graduate students have published papers analyzing the human remains and archaeological material from the Hickory Ground site. We have not been consulted in any of these studies.

Conclusion

Without consultation with the proper tribal relations of the remains and funerary objects, the objectives of NAGPRA are ignored and the NAGPRA operations become dangerously close to a dumping operation. Like the sciences and the formalized archaeological and anthropological studies often associated with the study of Native peoples and often times funded through federal granting programs, we ask for due diligence, transparency, and accountability in the research.

We are not requesting a formal repatriation. We do represent one of the challenges addressed in the GAO Report. Our current cultural practices (including ceremonial and burial) represent an unbroken heritage only interrupted by our forced removal from Alabama to Oklahoma. If we and other removed tribes continue to be divorced as stakeholders in the conversations involving our ancestral homelands and

ancestors and if this part of the historical record is not acknowledged or included in archaeological assessments, scholarly publications, and NAGPRA reporting, such exclusion does a disservice to the research involving the study and preservation of the archaeological record that is supposed to benefit everyone. Just like us, the small number of tribes who reside in areas once occupied by tribes removed to Oklahoma and elsewhere, represent a portion of the Native experience in the Southeast. To exclude any potential stakeholders or concerned communities from the consultation/research process calls into question the validity and thoroughness of the research and could result in skewed or revisionist history.

Thank you for the opportunity to submit this statement for the record.

Attachment 1

PROCLAMATION

****

WHEREAS, The traditional Tribal Towns of the Muscogee Nation have maintained a separate structure for governance based on tradition, language, culture, matrilineal blood relationship, common law, and custom since time immemorial, and

WHEREAS, At present day, there are sixteen (16) active ceremonial grounds, each recognized and supported by the Muscogee (Creek) Nation, and

WHEREAS, At the present time, the Hickory Ground Ceremonial Ground under the leadership of Mekko George Thompson, has asserted rightful claims as lineal descendants to protect, preserve, and maintain their ancestral ceremonial ground at Wetumpka, Alabama, and

WHEREAS, The Muscogee (Creek) Nation by legislation has recognized and supports Mekko George Thompson and his delegation to negotiate the re-interment of all human remains, associated funerary objects and other objects and to protect and preserve the cultural landscape of the ancient and historical Hickory Ground sacred site, and

WHEREAS, Alabama State Department of Transportation has identified a highway project funded with Federal funds on a site within the Hickory Ground landscape in Wetumpka, Alabama, however, the State has failed to consult as required under the National Historic Preservation Act (NHPA) §106 or other appropriate Federal statutes, and

WHEREAS, Hickory Ground Mekko George Thompson has determined he will be in consultation with proper Federal officials for a solution, and

WHEREAS, It is required that future National Environmental Protection Act (NEPA) and NHPA § 106 consultations will be necessary for the State of Alabama and elsewhere, and

WHEREAS, Any future consultation issues must be addressed by those traditional Tribal Towns who formerly occupied lands in the Southeast.

NOW THERFORE,

The traditional Tribal Towns of the Muscogee (Creek) Nation PROCLAIM we will unite in a Coalition of Tribal Town Mekkos which will support each Town's efforts to "protect, preserve and maintain" sacred historical sites in the aboriginal homelands of the Muscogee people, and

FURTHER THEREFORE,

The Coalition will share information and procedures under a Memorandum of Agreement (MOU) pursuant to Tribal law under the Muscogee (Creek) Nation Code of Laws and the following Federal laws and policy:

1. The *National Historic Preservation Act* (NHPA) of 1966 as amended; Revised §106 regulations (December 12, 2000), 16 USC 470, 470w-6
2. The *National Environmental Policy Act* (NEPA) of 1969, 42 USC 4321,4331-2
3. The *American Indian Religious Freedom Act*, 42 USC 1996, 1973
4. The *Archaeological Resources Protection Act*, (ARPA) 16USC 470Hh
5. The *Native American Graves Protection and Repatriation Act* (NAGPRA) of 1990, 25 USC 3001, 104 Stat. 3048, P.L. 101-601
6. The *Federal Antiquities Act* of 1906, 34 Stat.225, 16 USC 431-433

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SIGNATORIES: Ceremonial Grounds

Alabama

Okfuskee

Arbeka

New Tulsa

Duck Creek

Nuyaka

Fish Pond

Pole Cat (Kellyville)

Greenleaf

Peach Ground

Hillabee

Sand Creek (Iron Post)

Hickory Ground

Tahlahvse-Cromwell

Muddy Water (Weogufkee)

Tallahassee

PREPARED STATEMENT OF NATALIE A. LANDRETH, COUNSEL, WORKING GROUP ON NATIVE AMERICAN CULTURALLY UNIDENTIFIED HUMAN REMAINS

Mr. Chairman, Mr. Vice Chairman and Members of the Committee:

This statement is submitted for the record in response to issues raised at the June 16 NAGPRA oversight hearing. The Working Group on Native American Culturally Unidentified Human Remains consists of Native American community, tribal and religious leaders with expertise in tribal and federal repatriation policy and repatriations. Most of the Working Group members were instrumental in the development of NAGPRA.

The Working Group was formed more than a decade ago specifically to advocate for a rule providing for the return of the culturally unidentified human remains and associated funerary objects set aside when NAGPRA was passed. This rule, now 43 CFR 10.11(c)(4), was made final on May 14, 2010. Unfortunately, although mandating the return of the human remains, the final rule purports to allow museums and other holding repositories to keep funerary objects associated with those remains, thus separating the people from the items he or she was buried with -- a totally unacceptable result that has no precedent either in culture or law. A burial always has been a unitary concept. In Native culture, the items buried with a person have critical spiritual significance and removing them may disturb that spirit. Even U.S. law does not permit the removal of objects deposited in a grave. We also attach resolutions of the National Congress of American Indians that support this position. (Exhibit 1) **Exhibit 1 is printed on page 80 of this hearing**

The Working Group submitted comments to the National NAGPRA office identifying this significant problem (attached herewith as Exhibit 2), but it failed to change the rule. The NPS stated that the text of NAGPRA required this rule by failing to mention associated funerary objects in the authorizing section. (Exhibit 3) While the Working Group does not agree with this analysis, if NAGPRA is to be reopened for any amendment, the Committee should seriously consider amending the Act to state expressly that culturally unidentified human remains may not be separated from their associated funerary objects. The amendment would look like this:

> Section 8(c)(5) of Public Law 101-601 (25 U.S.C. 3006(c)(5)) is amended by inserting "and associated funerary objects" after "culturally unidentifiable human remains" and by inserting "and associated funerary objects" after "such remains."

The second issue that the Working Group has focused on in the past several years is the so-called Kennewick Fix. As you are aware, the Kennewick Man case (or, more properly, the Ancient One) resulted in a strange and unsupported ruling that because Congress used the word "is" in the definition of "Native American," human remains that predate the founding of the United States in 1789 are not covered by NAGPRA. Surely this is not what Congress intended. We strongly encourage the Committee to amend NAGPRA to make it explicit that NAGPRA covers all human remains. The amendment would be a simple one:

> Section 2(9) of Public Law 101-601 (25 U.S.C. 3001(9)) is amended by inserting "or was" after "is."

Although the Bush Administration opposed this amendment, the current Administration should be asked to rescind the previous position so that this amendment can go forward. This issue too has the full support of the NCAI. (Exhibit 4)

We hope that the Committee will very carefully and seriously consider making the two amendments suggested in this letter. Both are meant to correct obvious misinterpretations and abuses of the law. Both comport with the original intent of the law. Both have the support of this Working Group, as well as the NCAI. Please contact the undersigned if you wish to discuss any information in this letter. We would be happy to work with you on these important issues.

Exhibit 2

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May 14, 2010

Dr. Sherry Hutt, Manager
National NAGPRA Program
National Park Service
1201 Eye Street, NW, 8th Floor
Washington, DC 20240

Re: Comments of the Chugach Alaska Corporation, Comanche Nation, the Mississippi Band of Choctaw Indians, the Pawnee Nation, the Pyramid Lake Paiute Tribe and the Working Group on Culturally Unidentified Native American Human Remains on the DRAFT Final Rule (43 CFR Part 10) Disposition of Culturally Unidentifiable Human Remains (1024-AD68)

I. Introduction

These comments are submitted in response to the Federal Register notice (March 15, 2010) to provide comments on the final rule on the disposition of culturally unidentifiable human remains (CUHR) under the Native American Graves Protection and Repatriation Act (NAGPRA). The comments are respectfully submitted on behalf of the following NARF clients: (1) the Working Group on Culturally Unidentified Native American Human Remains ("Working Group")[1]; (2) the Chugach Alaska Corporation; (3) Comanche Nation; (4) the Mississippi Band of Choctaw Indians; (5) the Pawnee Nation; and (6) the Pyramid Lake Paiute Tribe. We appreciate the opportunity to comment on this draft final rule.

We strongly supported the proposed rule, as described in our original comments submitted on January 11, 2008, and we strongly support the draft final rule now open for comment.[2] The lack of a final rule on these at least 126,000 human remains has resulted in an inability to effectuate fully the purpose and meaning of NAGPRA. Each one of the 126,000 is entitled to the dignity and respect of going home to a decent (re)burial. It is important to remember that few, if any, of the people now housed in shoeboxes, cardboard coffins and warehouses in federal and federally supported museums and agencies across the United States are there voluntarily; this problem was created by a culture that encouraged wholesale graverobbing and the collection of human remains to perpetuate racist

1 The composition of this Working Group was previously described in comments submitted with respect to this same rule when it was first proposed for comment (January 11, 2008).
2 Our support is not wholesale because, as described herein, we believe the two sentences making the return of funerary objects optional is arbitrary, capricious and clearly contrary to the statute.

pseudo-science like phrenology. This is a problem that was thrust upon Indigenous people; it was the stated goal of NAGPRA to undo some of this damage and this final rule is one significant step forward.

We are therefore grateful to the National Park Service, the Bureau of Indian Affairs, the staff of the Department of the Interior (DOI) involved in this effort, and the Office of Management and Budget for working together to finalize and publish this rule in draft and to request comments on it.

II. The DOI and the Review Committee are acting well within their authority.

As we reiterate our support, we also reiterate our firm belief that the draft final rule is well within the authority of the Review Committee. There is broad, ample authority under Sections 8(a), 8(c)(2), 8(c)(5), 8(c)(7), and Section 13 of NAGPRA. The Review Committee's role is in fact described quite broadly:

> [T]he Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under Sections 5, 6 and 7 [of NAGPRA].

§ 8(a). A similar provision appears in 8(c)(2), and of course section 8(c)(5) specifically mandates an inventory of human remains. The Review Committee is also broadly commanded to "consult[] with the Secretary in the development of regulations to carry out this Act. § 8(c)(7). Some special interest groups have suggested that the DOI and the Review Committee lack authority to issue the final rule, but these provisions prove otherwise to the most casual reader.

Moreover, we reiterate that the draft final rule – other than the two sentences regarding funerary objects below – is not arbitrary or capricious nor contrary to the statute. This rule is the product of ten years of consultation with the museum and scientific community, as well as with the Native American community. In addition, the draft final rule mirrors the process and ownership priority set forth in Section 3(a)(2) for discoveries after 1990. The final rule also comports with Section 7(a)(4), which describes how a requesting Indian tribe can demonstrate cultural affiliation in part through geographical information.

III. The proposal regarding funerary objects is arbitrary, capricious and clearly contrary to the statute.

The one part of the proposed rule to which we strongly object is the provision that would allow museums and agencies to keep associated funerary objects:

> A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.

§ 10.11(c)(4). 75 Fed. Reg. 12404. We object to this provision on several grounds. First, it is

arbitrary and capricious, and would therefore fail the *Chevron* test, in that no reasonable explanation has been provided for the agency's decision. According to the preamble of the final rule, "[t]wenty-two commenters stated that the disposition of culturally unidentifiable associated funerary objects should be mandatory" and only one recommended they be returned on a voluntary basis. 75 Fed. Reg. 12397. Nevertheless, the agency chose to disregard those comments on the erroneous grounds that there may be a takings problem by requiring museums to return funerary objects actually associated with remains that are to be returned. This leads to our second ground for objection: under general principles of property law, one does not have title or a right of possession to objects stolen from a grave or off the body of a dead person. Third, the proposal directly conflicts with other parts of the statute by mandating a separate process only for these objects. Fourth, it is inconsistent with the purpose and intent of NAGPRA in that it actually mandates the separation of the person from his or her property, thus dismantling a burial. NAGPRA was intended as Native American human rights law and not as repositories' property law. Fifth, from a public policy perspective, the proposal creates an impression that stealing "grave goods" is acceptable so long as the body is left undisturbed. In this respect, the proposed rule condones larceny and perpetuates the abhorrent practice of stealing from Native American graves and deceased persons. Finally, the federal government does not have title to the funerary objects in question and does not have the authority to transfer title from deceased Native American persons to repositories.

A. What are associated funerary objects?

It is important to set out first what associated funerary objects are in the context of Indigenous cultures and within the context of the law. Associated funerary objects are those that were intentionally placed with a person, belonged to a person, stand as a surrogate for a person, and often serve a specific purpose in a person's spiritual well-being and journey from this life to an afterlife. These objects are religious, spiritual, and/or cultural in nature and are specifically placed with him or her as part of the burial rite, ceremony, or service. They are considered integral to that process and are treated as possessions of the deceased. A burial is a unitary whole and the associated funerary objects are an inseparable part of that whole.

Congress codified these concepts by providing that associated funerary objects are "objects that, *as part of a death rite or ceremony of a culture*, are reasonably believed to have been placed *with* individual human remains either at the time of death or later." §2(3)(A) (emphasis added). They are considered "associated" within NAGPRA because both the objects and the human remains to which they belonged are in the "possession or control" of the same agency or museum. *Id.* In other words, the burial is together and whole, the way it was intended. The law also treats surrogates as associated funerary objects:

> "associated funerary objects" which shall mean . . . [objects placed with human remains as described above], except that other items *exclusively made for burial purposes* or to contain human remains shall be considered as associated funerary objects.

§ 2 (3)(A) (emphasis added). Many, if not most of these objects are surrogates for the deceased persons themselves and are to be treated as human remains.

B. There is no reasonable basis for the decision.

According to the preamble, the decision to make return of associated funerary objects voluntary is based on two arguments. First, the preamble states that section (8)(c)(5) assigns to the Review Committee the task of developing a process for the return of culturally unidentifiable human remains but "did not indicate the same intent regarding culturally unidentifiable associated funerary objects." Second, the preamble suggests that requiring repatriation of associated funerary objects may raise takings issues and points to a section of Senate Report 101-473 providing that the right of possession is meant to "operate in a manner consistent with general property law."

The first of the two arguments has little statutory support because, as described in detail above, the DOI and the Review Committee are provided with broad authority to issue regulations implementing NAGPRA. It is not clear why authority would be limited to just the words in section 8 (c)(5) and this is a crabbed reading of the statute. Longstanding and generally accepted principles of statutory construction do not permit cherry-picking a statute in this manner. On the contrary, "[i]t is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole." *Sierra Club v. St. Johns River Mgmt.*, 816 So.2d 687, 693 (5th Cir. 2002). Construing the statute as silent on the issue of associated funerary objects would not pass this test, given the numerous broad grants of authority under the statute.

The same court further explained that "[c]ourts must avoid any construction of a statute that would produce an unreasonable, absurd or ridiculous consequence." *Sierra Club* 816 So.2d at 693. The suggestion that the statute grants no authority to issue a regulation on funerary objects associated with the unidentifiable human remains is unreasonable and would lead to the following absurd results:

1. It would create public policy that graverobbing of objects is acceptable.
2. It would mandate the breakup of a burial by returning the human remains while allowing the museum or agency to keep the objects buried with these people.
3. It would conflict with longstanding principles of property law.
4. It would suggest there is a different right of possession for objects and people that were unearthed together and at the same time.
5. It would suggest there is a different right of possession based on whether objects are culturally unidentifiable.
6. It would conflict with other parts of the statute that do mandate the return of associated burial objects.

It is not clear whether the agency has yet considered these issues, but we encourage you to do because separating associated burial objects and creating a whole separate category for them creates numerous conflicts with the statute, with property law, and with common sense.

C. Under longstanding principles of property law, there is no right of possession in objects stolen from a grave or off of a dead person's body.

As Dr. Hutt has noted on several occasions, Congress intended that NAGPRA "operate in a manner that is consistent with property law." Senate Report 101-473 (Sept. 26, 1990).[3] Longstanding, well-established principles of property law clearly state that one who removes a body or objects from a grave without authorization from the decedent's heirs does NOT hold a right of possession. The draft final rule thus conflicts with property law.

Under most tribal common law, the funerary objects belong to the actual person being buried. According to this view, no one else thereafter has a right of possession. However, even under Western common law, and under the statutes of most states, burial objects removed from a grave belong to the person who buried the deceased or that person's descendants.

Cases addressing this issue are many and reach back to the early days of the United States. For example, in 1844, a group of individuals, all by the last name of Connor, broke open the tomb of Dorothéo LeGros and removed all the jewels that had been buried with her. The graverobbers were convicted of larceny and sentenced to four years in prison. The court held that, although the objects were meant to be buried with Ms. LeGros, they need not necessarily be reburied with her, but were in fact the property of her heir(s). *Ternant v. Boudreau*, 6 Rob. (Louisiana) 488, 1844 WL 1761 (1844). The same rule applies to removing the coffin and replacing the body in the ground. *State v. Doepke*, 68 Mo. 208, 1878 WL 9645 (Mo.) (1878).

The rule remained unchanged into the 20th century. When an undertaker removed a body from a casket in order to re-use it in another burial, he was convicted of larceny because the coffin was property of the decedent's heirs. *Maddox v. State*, 31 Ga. App. 556, 121 S.E. 251 (1924). This rule even extends to the flowers set atop a grave, until such time as the flowers die. *Busler v. State*, 17 Beeler 675, 181 Tenn. 675, 184 S.W.2d 24 (1944). In fact, the line only stops at the tombstone, which is considered realty and part of the property upon which it is set. *State v. Jackson*, 218 N.C. 373, 11 S.E.2d 149 (1940).

This well-established rule even extends to deceased people who have not yet been buried. In *Wanson v. Sayward*, the plaintiff Samuel Wonson actually was deceased, but the complaint was brought in his name and on behalf of his heirs. Mr. Wonson had been a cook on a merchant ship but had drowned in shipwreck. His body was washed ashore, at which time someone admired his fancy leather boots and took them off his body. The Supreme Judicial Court of Massachusetts ruled in short order that it was a felony to remove anything from the body of a deceased person, and that his personal property belong to his estate and heirs, if any. 13 Pick. 402, 30 Mass. 402, 1832 WL 2589 (1832). In the context of NAGPRA, this would apply to victims of the Wounded Knee and Sand Creek Massacres, for example, and similar persons whose skulls and personal effects were removed by the U.S. Army and others while they lay dead.

This general rule was applied in a specific situation involving Native American graves in the case of *Charrier v. Bell*, 496 So.2d 601. Some have pointed to *Charrier* as an isolated case. However,

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3 Some scholars have argued that property law is, at best, an awkward fit for Native American traditions and values. *See, e.g.* Rebecca Tsosie, "Land, Culture and Community: Reflections on Native Sovereignty and Property in America," 34 IND. L. REV. 1291 (2001).

when viewed in the context of the two hundred years of property law, the result in *Charrier* was no accident. As in all the cases described above, a person removed objects from graves in an ancient burial mound and claimed title to them. His theory was that the objects had been abandoned and belonged to no one. The court held that the burial objects had not been abandoned and could not be claimed in this way like ordinary trinkets. *Id.* at 605. The court went one step further, noting that the Tunica Indians as descendents "have a right to enjoin disinterment of their deceased relatives, as well as to receive damages for the desecration involved." *Id.* at 607. That decision has not been overturned and remains good law.

In none of these cases was it considered relevant to examine on whose land the objects were found. None of the cases treated burial objects the same as non-burial artifacts. There are no cases holding that the rule is any different once these objects leave the hands of the graverobber and enter a respected institution.

Moreover, many of the common law rules as set forth in these cases may be older, but that is only because this rule has now been codified into criminal statute in almost all 50 states. The statutes are remarkably similar to the general rule described above in that they make it a crime to remove objects buried in a grave. This is what they generally look like:

> A person is guilty of a felony who, without authority of law, willfully . . . disturbs a human burial site, human remains, or burial goods found in or on any land, or attempts to do the same, or incites or procures the same to be done.

North Dakota Stat. 23-06-27 (3). The statutes vary only in the class of the offense in that in some states it is a misdemeanor.

Finally, with respect to the property issues, the preamble suggests there may be a takings problem with respect to these objects, but not one case or precedent is cited. Similarly, special interest groups have claimed that "[f]ederal and state laws over time have vested legal rights of possession in certain institutions authorizing them to receive and curate human remains." Comments of the Society of American Archaeologists on the proposed rule, January 14, 2008. This vague statement is insufficient support for the kind of sweeping change in property law contemplated by the draft final rule, and none of these groups have provided legal authority to support their position. Unless and until they can produce authority showing that the long held rule of property law has changed, they are now in violation and the draft final rule would perpetuate those violations.

D. <u>The proposal conflicts with the statute.</u>

As noted above, the final rule on funerary objects conflicts with certain sections of NAGPRA. Under Section 3, which deals with cultural items discovered on federal or tribal lands after 1990, culturally unidentifiable human remains and associated funerary objects are to be returned to the Tribe(s) that aboriginally occupied the area – the same process set forth for human remains (but not objects) in the current draft final rule. Why is there one rule for associated funerary objects discovered before 1990 and a different one for objects discovered after 1990? More specifically, why is there a different right of possession in funerary objects discovered before 1990 and those

discovered after? What rule justifies this different treatment?

The draft final rule conflicts even more starkly with another section. Under Section 7, which mandates the repatriation of human remains and associated funerary objects once affiliation is determined, Indian tribes can still make claims and show cultural affiliation through a variety of evidence, including geographic evidence. The draft final rule would seem to undo this process. If it does not, and the agency and Review Committee intend for these to be separate in some way, they need to explain how and why they are treated differently. Both concern unaffiliated human remains and objects, yet one allows for tribes to make claims and have items repatriated based on the preponderance of evidence, while the other says return of objects is optional.

At the very least, the agency must withhold this part of the final rule until these very clear disputes can be resolved.

E. The proposal conflicts with the intent and purpose of NAGPRA.

By allowing museums and agencies to retain associated funerary objects while repatriating the people who owned these items, the final rule actually encourages the breaking up of the burial – a concept intolerable to those who worked on the development of NAGPRA. A burial is a unitary whole, consisting of the person and his or her property and any and all religious or cultural items and burial dressings. It would have been inconceivable to the drafters and the many, many Native people that advocated the passage of this bill that any part of it could be construed as encouraging the break up of a burial, yet this is precisely what the draft final rule would do. In this way, the draft final rule is wholly inconsistent with the purpose and intent of NAGPRA, which was to protect burials and return them home.

The draft final rule would create a terrible public policy. It strongly suggests that funerary objects are mere property subject to a "finders keepers" rule. If someone dug up your grandmother and stole her wedding ring and then sold it, would that be acceptable? Under this rule, that would be fine if it occurred before 1990. This draft final rule also would perpetuate the abhorrent view that Native American property and burials are entitled to less protection under law.

IV. Conclusion

The agency and the Review Committee are well within their authority in issuing the final rule, and they would be well within in their authority to issue a rule on the funerary objects associated with the remains that stand to be repatriated under the draft final rule. There is ample and broad authority for this. Moreover, we support the draft final rule, with the exception of its treatment of funerary objects. That section is arbitrary, capricious, contrary to the statute, and contrary to the law. Further, no explanation is offered to justify this extraordinary departure from long-settled property law. The agency and the Review Committee should not implement this provision. Instead, they should issue a rule that the associated funerary objects will be repatriated at the same time and in the same manner as the people to whom they belong. Moreover, such a rule should specify a reasonable time frame for this process to begin, such as within 90 days of implementation of the final rule. If the agency fails to do this, they can expect legal challenge to this part of the rule.

Exhibit 3

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 10

RIN 1024–AD66

Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule with request for comments.

SUMMARY: This final rule implements the Native American Graves Protection and Repatriation Act by adding procedures for the disposition of culturally unidentifiable Native American human remains in the possession or control of museums or Federal agencies. This rule also amends sections related to purpose and applicability of the regulations, definitions, inventories of human remains and related funerary objects, civil penalties, and limitations and remedies.

DATES: This rule is effective May 14, 2010. Comments must be received by May 14, 2010.

ADDRESSES: You may submit comments on this final rule, identified by the number 1024–AD66, by any of the following methods:

• *Federal rulemaking portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

• *Mail or hand delivery:* Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Sherry Hutt, Manager, National NAGPRA Program, National Park Service, 1201 Eye Street, NW., 8th Floor, Washington, DC 20005, Telephone: (202) 354–1479, Fax: (202) 371–5197.

SUPPLEMENTARY INFORMATION:

Background

The Native American Graves Protection and Repatriation Act of 1990 (the Act) addresses the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. Among other things, the Act:

—Established the Native American Graves Protection and Repatriation Review Committee, composed of representatives from museum and scientific organizations and from Indian tribes and Native Hawaiian organizations (the Review Committee) to monitor and review inventory, identification, and repatriation activities.

—Required the Review Committee to consult with the Secretary of the Interior in developing regulations to implement the Act.

—Charged the Review Committee with compiling an inventory of culturally unidentifiable human remains in museums or Federal agencies and recommending actions for disposition of these remains.

In 1995, during initial development of the regulations to implement the Act, the Department decided to reserve several sections for later development. This decision ensured that development of more complex provisions would not delay implementation of the basic regulations needed to guide compliance with impending deadlines for inventory submissions. We are implementing this long-term publication plan as follows:

—We published the first rules to implement the Act on December 4, 1995 (43 CFR part 10, 60 FR 62158).

—We published rules for assessing civil penalties under the Act on April 5, 2007 (43 CFR 10.12, 68 FR 16354).

—We published rules for new collections and continuing obligations for compliance on March 21, 2007 (43 CFR 10.13, 72 FR 13189).

—We are publishing this rule today.

—We are developing additional rules to cover disposition of unclaimed Native American human remains and cultural items from Federal and Indian lands (future 43 CFR 10.7).

Publication of this rule furthers the Department's goal of publication in phases.

On October 15, 2007, we published in the Federal Register the proposed rule to specify procedures for disposition of culturally unidentifiable human remains in the possession or control of museums or Federal agencies. At that time, we invited public comment for a 90-day period, ending on January 14, 2008, and posted the proposed rule on the National NAGPRA Program Web site.

During the comment period, we received 136 written comments from 51 Indian tribes, 19 Indian organizations, 30 museums, 12 museum or scientific organizations, 3 Federal entities, 15 members of the public, and the Review Committee. The comments addressed all sections of the proposed rule. We fully considered all of those comments and this final rule includes extensive revisions that we have made response to the concerns raised by commenters.

As required by the Act, the Review Committee sent comments to the Secretary in 2000, 2003, and 2009. During its January 2008 teleconference, the Review Committee suggested that the Department extend the comment period for the proposed rule or reissue a revised proposed rule for further comment. After the close of the comment period, we worked with the Office of the Solicitor to prepare a draft final rule and preamble responding to comments. The following brief chronology outlines the reviews that have occurred since we developed the rule:

—The Assistant Secretary—Fish and Wildlife and Parks and the Assistant Secretary—Indian Affairs reviewed the draft final rule and considered the recommendations of the Review Committee.

—The Assistant Secretaries determined that the draft final rule and preamble were responsive to comments, and that, given the lengthy comment period, there was no need or basis to extend the comment period or to repropose the rule.

—The Department identified a procedural problem with publication of the final rule relating to the Paperwork Reduction Act, which resulted in additional delays totaling 8 months.

—With the change of administration, the Department's management conducted additional review by the Assistant Secretary—Fish and Wildlife and Parks and the Assistant Secretary—Indian Affairs.

As the preceding summary illustrates, this final rule has undergone extensive review in multiple administrations. Each of these reviews was conducted independently, and both the current and previous administrations agreed that this rule is appropriate for implementation. In addition to the opportunities for comment that we have already offered, we are accepting comments on this rule until May 14, 2010.

The current Assistant Secretary—Fish and Wildlife and Parks and the current Assistant Secretary—Indian Affairs have determined that this final rule and preamble are fully responsive to the comments received on the proposed rule and that the ten-year process of developing the rule, as well as the substantive provisions of the rule, fit well with the Administration's goals of transparency in decision making and open consultation with Indian tribes. Comments to this rule covered myriad issues that have arisen in the 20 years since NAGPRA became law. Although

to NAGPRA, Federal agencies and museums are encouraged to consult with their appropriate state agencies, especially if they propose to voluntarily transfer control to an Indian group that is not federally-recognized under § 10.11(c)(2)(ii)(A) or reinter culturally unidentifiable human remains, with or without associated funerary objects, pursuant to state law under § 10.11(c)(2)(ii)(B).

Comment 127: One commenter stated that, if culturally unidentifiable human remains, with or without associated funerary objects, are not claimed, the remains should continue to be in the care of the museum or Federal agency, without precluding future repatriation.

Our Response: In such a situation, the museum or Federal agency may, under the final rule, transfer control of the remains, with or without the funerary objects, to an Indian group that is not federally-recognized, reinter them under state law, or enter into an agreement with a federally-recognized Indian tribe for other disposition. The ultimate disposition of culturally unidentifiable human remains, with or without associated funerary objects, control of which is not transferred under these regulations, is outside the scope of these regulations and reserved for Section 10.15(b).

Comment 128: One commenter recommended clarification that once all efforts to transfer control to an Indian tribe, Native Hawaiian organization, or an Indian group that is not federally-recognized have been exhausted, the museum or Federal agency should reinter culturally unidentifiable human remains at their place of discovery.

Our Response: Under § 10.11(c)(2)(ii)(B), museums and Federal agencies may reinter culturally unidentifiable human remains upon receiving a recommendation from the Secretary or authorized representative.

Section 10.11(c)(4) Secretary's Recommendation

Section 10.11(c)(4) (renumbered as § 10.11(c)(3)) stipulated that the Secretary may make a recommendation under § 10.11(c)(3) (renumbered as § 10.11(c)(2)) only with the written consent of all Indian tribes and Native Hawaiian organizations stipulated in § 10.11(c)(1).

Comment 129: Three commentors supported the § 10.11(c)(4) language requiring the written consent of all Indian tribes and Native Hawaiian organizations stipulated in §§ 10.11(c)(1) and (c)(2) before the Secretary can make a recommendation under § 10.11(c)(3). Seven commenters stated that § 10.11(c)(4) of the proposed rule would create an unfair burden on both federally-recognized Indian tribes that are not interested in a disposition and Indian groups that are not federally-recognized that may lack the resources to meet the requirement of obtaining the consent of all relevant federally-recognized Indian tribes before a museum or Federal agency may transfer control of culturally unidentifiable human remains to a an Indian group that is not federally-recognized. Some of the commenters suggest that the final rule require that the museum or Federal agency make a good faith effort to consult with all of the relevant federally-recognized tribes, and, if no federally-recognized tribe has objected, then the disposition to the "culturally affiliated" Indian group that is not federally-recognized should be permitted to go forward.

Our Response: The Secretary agrees with these comments, and has revised the final rule to incorporate their suggestions. Sections 10.11(c)(3), (c)(3), and (c)(4) have been renumbered as § 10.11(c)(5), (c)(2), and (c)(3) respectively.

Comment 130: Four commenters stated that § 10.11(c)(4) of the proposed rule unduly restricts the flexibility of museums and Federal agencies by requiring that they receive a recommendation from the Secretary before transferring control of culturally unidentifiable human remains, with or without associated funerary objects, to an Indian group that is not federally-recognized or reinterment of the remains under State law.

Our Response: Congress enacted NAGPRA in furtherance of the government-to-government relationship with federally-recognized Indian tribes. Also in furtherance of that relationship, the Secretary has the obligation to ensure that the rights of these tribes under the statute and under these regulations are fully supported. Therefore, in the case of a proposed disposition to an Indian group that is not federally-recognized or a proposed reinterment under State law, the recommendation of the Secretary is needed to make sure that the museum or Federal agency has consulted with the relevant federally-recognized Indian tribes and none of the tribes have objected. This is also consistent with the current practice that the Review Committee and the Secretary have developed for disposition [even to federally-recognized tribes] of culturally unidentifiable human remains.

Comment 131: One commenter recommended that the Secretary only authorize reburial pursuant to State law after the museum or Federal agency has attempted in good faith to transfer control of the culturally unidentifiable human remains to an affiliated Indian group that is not federally-recognized.

Our Response: A museum or Federal agency may voluntarily transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized or reinter culturally unidentifiable human remains according to state or other law only after receiving a recommendation from the Secretary or authorized representative. The Secretary will consider evidence related to both options prior to making such a recommendation.

Comment 132: One commenter requested that the Secretary offer a process for seeking the recommendations of the Review Committee concerning proposed dispositions.

Our Response: Under section 8(c) of the Act (25 U.S.C. 3006(c)), the Review Committee is charged with reviewing and making findings concerning the return of cultural items upon the request of any party and with facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable. The process for bringing requests and disputes before the Review Committee is found on the National NAGPRA Web site at *http://www.nps.gov/history/nagpra/REVIEW/Procedures.htm*. In addition, § 10.11(e) specifically identifies the Review Committee as a possible forum to assist in the informal resolution of disputes regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

Section 10.11(c)(5) Voluntary Transfer of Associated Funerary Objects

Section 10.11(c)(5), which has been renumbered as § 10.11(c)(4), clarifies that a museum or Federal agency may voluntary transfer control of funerary objects that are associated with culturally unidentifiable human remains.

Comment 133: Twenty-two commenters stated that the disposition of culturally unidentifiable associated funerary objects should be mandatory. Three commenters indicated that sufficient legal authority and congressional intent exist to require the mandatory disposition of culturally unidentifiable associated funerary objects. Three commentors stated that disposition of culturally unidentifiable associated funerary objects should be

mandatory because different treatment of such objects is contrary to American common law and Indian funeral traditions. One commenter stated that disposition of such objects should be mandatory because some institutions will not voluntarily transfer objects. One commenter supported the disposition of funerary objects associated with culturally unidentifiable human remains on a voluntary basis. Three commenters recommended deleting § 10.11(c)(5) and amending § 10.11(c)(1) to read, "A museum or Federal agency that is unable to prove that it has right of possession, as defined at 10.11(c)(2) [sic], to culturally unidentifiable human remains and associated funerary objects must offer to transfer control of the human remains and associated funerary objects to Indian tribes and Native Hawaiian organizations in the following priority order * * *".

Our Response: Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. In section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), Congress assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress did not indicate the same intent regarding culturally unidentifiable associated funerary objects. Mandatory disposition for this category of items raises right of possession and takings issues that are not clearly resolved in the statute or the legislative history. American common law generally recognizes that human remains cannot be owned. The common law regarding associated funerary objects that are not culturally identifiable is not well established. According to the committee report accompanying the Senate NAGPRA bill, the Senate Committee on Indian Affairs intended that the legal framework regarding right of possession would operate in a manner consistent with general property law (S. Report 101–473 at 6). Considering the lack of precedent in the common law and Congress' direction to develop a process only with respect to culturally unidentifiable human remains, the Secretary does not consider it appropriate to make the provision to transfer culturally unidentifiable associated funerary objects mandatory.

Comment 134: Seven commenters recommended deleting § 10.11(c)(5) on the grounds that the Secretary does not have authority to address funerary objects associated with culturally unidentifiable human remains.

Our Response: Section 10.11(c)(5) has been renumbered as § 10.11(c)(4). In section 13 of the Act (25 U.S.C. 3011), Congress delegated authority to the Secretary of the Interior generally to promulgate regulations carrying out the Act and carrying the force of law. Consideration of all Native American human remains and associated funerary objects, including those that are culturally unidentifiable, is within the scope of the statute. section 5 of the Act (25 U.S.C. 3003) requires Federal agencies and museums that have possession or control over holdings or collections of Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item. Regulations promulgated in 1995 initially addressed culturally unidentifiable associated funerary objects to which there was no public objection. 43 CFR 10.9(a)(3) required museums and Federal agencies to provide notice and a copy of the list of culturally unidentifiable human remains and associated funerary objects to the National Park Service which in turn made this information available to the Review Committee. Congress anticipated that not all items would be geographically or culturally affiliated and, in section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), assigned the role of recommending specific actions for developing a process for disposition of culturally unidentifiable human remains to the Review Committee. Congress intended that the Review Committee be an advisory committee which makes recommendations to the Secretary (S. Rep. No. 101–473 at 13). In section 8(c)(7) of the Act (25 U.S.C. 3006(c)(7)), Congress also authorized the Review Committee to consult with the Secretary in the development of regulations to carry out the Act. As part of its recommendations under section 8(c)(5) of the Act (25 U.S.C. 3006(c)(5)), the Review Committee addressed funerary objects associated with culturally unidentifiable remains and recommended their transfer along with the associated remains. This regulation, promulgated in the exercise of Congress' delegated authority, implements many of the Review Committee's recommendations made pursuant to section 8(c)(5) and 8(c)(7) and effectuates the goals of the Act. Even if Congress may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap, it can still be apparent from an agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to address ambiguities in the statute or fill a gap in the enacted law, even one about which Congress may not have actually had an intent as to a particular result (*U.S. v. Mead*, 533 U.S. 218 (2001)). In addition, 25 U.S.C. 9 authorizes the Secretary to make "such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs." Because NAGPRA is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate any regulations needed to implement it under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F.2d 1354, 1360 (9th Cir. 1986)).

Comment 135: Two commenters objected to the "required" disposition of funerary objects associated with culturally unidentifiable human remains.

Our Response: The subsection addressing this category of objects, § 10.11(c)(4), does not require disposition. The proposed text states, "A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them" (emphasis added).

Comment 136: One commenter requested clarification on whether it is discretionary for museums and Federal agencies to make disposition of culturally unidentifiable associated funerary objects.

Our Response: Subsection 10.11(c)(4) does not mandate the transfer of culturally unidentifiable associated funerary objects. This provision is voluntary and any decision to transfer such objects is based on the discretion of the museum or Federal agency.

Section 10.11(c) Other Issues

Comment 137: Two commentators suggested the establishment of national or regional repositories, controlled by Indian tribes, where culturally unidentifiable human remains that are unclaimed may be voluntarily relinquished.

Exhibit 4

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #TUL-05-029

TITLE: Supporting Amending NAGPRA Definition of "Native American"

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Native American Graves Protection and Repatriation Act (NAGPRA) was passed in 1990 in order to benefit tribes by restoring to indigenous peoples the basic human rights to protect the graves of their ancestors; and

WHEREAS, the Bonnichsen litigation, addressing the repatriation of *Techuminsh Oytpamanatiyt* (aka the Ancient One or Kennewick Man), has created many problems throughout the country in implementation of NAGPRA; and

WHEREAS, one problem created by the Bonnichsen litigation is the judicially established requirement of a significant relationship to an existing tribe prior to NAGPRA applying, which has created a loop-hole whereby museums and agencies can unilaterally, and without consultation, determine remains not to be Native American and therefore not start the NAGPRA process for repatriation; and

WHEREAS, in 2004, Senator Ben Nighthorse Campbell introduced S. 2843, an amendment to NAGPRA to resolve one of the problems created by the Ancient One litigation, adding the words "or was" to the definition of Native American, but the bill did not pass; and

WHEREAS, in March, 2005, Senator McCain introduced S. 536, Native American Omnibus Act of 2005, which contained a similar amendment to NAGPRA introduced by Senator Campbell; and

WHEREAS, the amendment to NAGPRA would add the words "or was" to the definition of Native American as well as the words "*any geographic area that is now located within the boundaries of*" so that the new definition would read:

"'Native American' means of, or relating to, a tribe, people, or culture that is *or was* indigenous to *any geographic area that is now located within the boundaries of* the United States."

which would address the problems created by judicial interpretations of NAGPRA and restore to the law the congressional intent behind the legislation; and

WHEREAS, in a May 10, 2005 letter to the Senate Committee on Indian Affairs, Matt Eames, Director of the Office of Congressional and Legislative Affairs voiced the support of the Department of the Interior for S. 536 containing, among other things, the amendment to NAGPRA; and

WHEREAS, on July 28th, 2005, Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks testified on behalf of the Department of the Interior in opposition to the NAGPRA amendment; and

WHEREAS, every other testifier supported, or did not oppose, the legislation with the exception of the attorneys who represented the scientists in the Bonnichsen litigation; and

WHEREAS, the Department of the Interior has a trust responsibility to protect the interests of the tribal nations as well as a duty to implement the law passed to benefit those tribes yet it failed to consult or communicate with any tribes prior to taking this position on the NAGPRA amendment.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby support the amendment to the Native American Graves Protection and Repatriation Act inserting the words "or was" and "*any geographic area that is now located within the boundaries of*" *to the definition of "Native American;"* and

BE IT FURTHER RESOLVED, that NCAI calls upon the Department of the Interior to support the NAGPRA amendment because it benefits tribes and resolves problems in NAGPRA implementation raised in the Bonnichsen litigation; and

BE IT FURTHER RESOLVED, that NCAI requests the Department of the Interior to consult, as soon as possible, with tribes nationally on NAGPRA to explain why the Department changed its opinion of the NAGPRA amendment so dramatically and without consultation with any tribes; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted at the 2005 Annual Session of the National Congress of American Indians, held at the 62nd Annual Convention in Tulsa, Oklahoma on November 4, 2005 with a quorum present.

ATTEST:

President

Recording Secretary

Adopted by the General Assembly during the 2005 Annual Session of the National Congress of American Indians held from October 30, 2005 to November 4, 2005 at the Convention Center in Tulsa, Oklahoma.

Prepared Statement of Reno Keoni Franklin, Chairman, National Association of Tribal Historic Preservation Officers

Thank you for the opportunity to submit written testimony for this oversight hearing on:

- Public Law 101-601, the Native American Graves Protection and Repatriation Act (November 16, 1990); and the
- Public Law 101-185, the National Museum of the American Indian Act (November 28, 1989; later amended in 1996 to include repatriation provisions)

On behalf of NATHPO and our member Indian tribes, we thank the committee members for your time and attention on implementing these important federal laws that direct federal agencies and museums to work with Indian tribes and Native Hawaiian organizations to seek timely repatriation of Native American human remains and cultural objects.

NATHPO Background

The National Association of Tribal Historic Preservation Officers (NATHPO) is a national not-for-profit professional association of federally recognized Tribal government officials who are committed to preserving, rejuvenating, and supporting American Indian, Alaska Native, and Native Hawaiian cultures and practices. Each Indian tribe that participates in the THPO program appoints an individual to serve as the main point of contact; this is the only federal law that calls for such an appointment.

In 1998, the initial cohort of 12 officially recognized Tribal Historic Preservation Officers (THPOs) created NATHPO with the mission to preserve Native languages, arts, dances, music, oral traditions, and to support tribal museums, cultural centers, and libraries. This is the 15th year of funding Indian tribes via the THPO program. There are now 119 THPOs with many more tribes applying for this status. Among other duties, THPOs assume the role and responsibilities of the State Historic Preservation Officers for their respective Indian reservations and aboriginal lands from which their ancestors once lived and were laid to rest. THPOs are not just tasked with complying with the National Historic Preservation Act; they are also often responsible for serving as the "NAGPRA representative" for their tribe.

NATHPO's membership includes THPOs and tribal governments that support the mission and goals of our organization. In addition to convening training workshops and national meetings, NATHPO has produced original research reports, including: ***Federal Agency Implementation of the Native American Graves Protection and Repatriation Act*** (2008); and ***Tribal Consultation: Best Practices in Historic Preservation*** (2005).

NAGPRA Background

The late 1980s were an important time period in Indian policy. The enactment of these three federal laws within a span of three years gave hope and changed many tribal communities:

1. NAGPRA, P.L. 101-601 (1990); and the
2. National Museum of the American Indian Act (1989; amended in 1996); and the
3. Indian Gaming Regulatory Act, P.L. 100-497 (1988).

In 1989-90, economic development in Indian country had yet to benefit from the Indian Gaming Regulatory Act as successful Indian casinos simply didn't exist yet. However, Indian tribes were asked to step into a NAGPRA process in the early 1990s that required substantial human and financial resources when the tribes had nothing. They also had to compete against each other for scarce resources, such as a NAGPRA grant.

NAGPRA was enacted in response to accounts that span many generations over the significant portion of two centuries. These accounts document a spectrum of actions from harvesting human remains from the battlefield to disinterment of existing graves to the theft of Native American human remains and funerary objects given to the deceased at burial, sacred objects of different types, and objects of cultural patrimony that belong to the collective Native community.

NAGPRA has been at times terrifically successful at the local level. More often, it is exemplary of the experiences of many American Indians, Alaska Natives, and Native Hawaiians: though the Act was created for their benefit and to rectify a moral wrong, most Native people have been unable to realize the law's potential and retrieve their dead and sacred objects and cultural patrimony that have been removed from their communities.

Makah-NATHPO Report: In 2008, NATHPO worked with the Makah Tribe to examine federal agency implementation of NAGPRA and released their report, ***Federal Agency Implementation of the NAGPRA,*** which included the finding that the Federal government neither assures compliance with nor enforcement of a federal law enacted to protect Indian remains and funerary objects and to reunite them with their families and homelands. The report also stated that Federal officials also have their frustrations and many said they could benefit from training on the repatriation process, but have inadequate resources. The report included many recommendations to improve the NAGPRA process and also specifically recommended that Congress request a Government Accountability Office (GAO) audit of Federal agency compliance, including the Smithsonian Institution.

Government Accountability Office (GAO) Audits: In the past three years, the Senate Committee on Indian Affairs and the House Committee on Natural Resources requested a GAO audit of the federal agencies and the Smithsonian. In 2010 and 2011 GAO issued the following reports, the titles of which speak for themselves:

- ***NAGPRA: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*** (2010) that looked at the work of eight agencies: Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, National Park Service, Forest Service, Army Corps of Engineers, and the Tennessee Valley Authority.
- ***Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects*** (2011) that reported on the lengthy and resource intensive repatriation process used by the Smithsonian's two museums that have Native American collections -- the National Museum of Natural History and the National Museum of the American Indian.

House and Senate Oversight Hearings: In October 2009 the House Committee on Natural Resources, Rep. Nick Rahall chair, held on oversight hearing on NAGPRA, which NATHPO was a witness, and the Senate Committee held this hearing after the GAO completed its two audits and reports.

<u>Challenges and Barriers in the Repatriation Process</u>

NATHPO supports the recommendations listed in both GAO reports, including developing a needs assessment and timeline for federal agencies to comply with NAGPRA and a reporting requirement to Congress. The GAO recommendations on Smithsonian repatriation efforts include suggesting that Congress consider ways to expedite their repatriation process and to make cultural affiliations as efficiently and effectively as possible.

In addition, we provide information on the following critical areas of the repatriation process:

I. Consultation

Repatriation work is a process of consultation and information sharing. NAGPRA directs Federal agencies and museums to consult with Indian tribes and Native Hawaiian organizations in determining the cultural affiliation of human remains and other cultural items. Prior to passage of the Act, House Report 101-877 defined the term "consultation," but the Department of the Interior decided not to include a definition when it promulgated regulations. As a result, there has been a great deal of confusion as to what exactly is required. The 2006 Makah-NATHPO report recommended that the Department of the Interior revise the current regulations to define consultation consistent with the language in the House Report or, if the Department declines to do so expeditiously, the Congress amend the Act to include a specific definition of consultation.

NAGPRA directs each museum and Federal agency to complete an inventory of Native American human remains and associated funerary objects in their possession or control by 1995, with notification of cultural affiliation provided to the appropriate Indian tribe or Native Hawaiian organization by 1996. The Secretary of the Interior was directed to publish a copy of each notification in the Federal Register. The Makah-NATHPO researchers found that ten years later, a large number of these notices have still not been published and the human remains and associated funerary objects been not been listed on the culturally unidentifiable database, thus leaving them effectively hidden from the repatriation process. It is particularly disturbing that a number of these situations involve units of the National Park Service - the agency currently delegated by the Secretary of the Interior with the responsibility for implementing the Act. We recommend that, as for all federal programs, an open and transparent process needs to be instituted for the knowledge and use by all.

In May 2011, the National Park Service National NAGPRA Program held a "government-to-government consultation meeting with Indian tribes" on the topic of amending the NAGPRA regulations. This was the first time, to our knowledge, the NAGPRA program or the National Park Service, held a government-government tribal consultation meeting via conference call. Many tribal representatives expressed concern about the call and stated that it was not tribal consultation. This is another example of the importance and need for each federal agency to have an open and transparent consultation process that is understood and agreed upon by each consulting party.

The Makah-NATHPO report also noted that most Federal agencies do not have a designated contact person for purposes of implementing NAGPRA or if there is a designated contact, that person is typically responsible for other cultural resource compliance issues. Thus, NATHPO recommends that each Federal agency should promulgate a policy for the implementation of NAGPRA's statutory and regulatory requirements, including consultation requirements, and submit its policy to the National NAGPRA Program for publication in the Federal Register and that the Program also create a publicly available database that lists each Federal agency repository for curation purposes, including location and contact information. Also, the process that each agency proposes to follow for pre-decisional consultation associated with the determination of cultural affiliation of human remains and cultural items should be submitted to the Program for publication in the Federal Register.

II. Enforcement and Oversight

One of the biggest challenges to ensuring compliance with federal repatriation laws is the lack of an enforcement and oversight mechanism. In their 2010 report on Federal agencies, the GAO noted that, "While the act [NAGPRA] authorizes the Secretary of the Interior to assess civil penalties against museums for noncompliance, no enforcement mechanism exists to ensure federal agency compliance except through litigation by private parties."

The Makah-NATHPO report included suggestions on creating an enforcement and/or oversight tool/s for federal agencies, such as an inter-agency NAGPRA implementation council within the executive branch, which would also establish a mechanism for referring complaints of non-compliance to the Inspector General of each federal agency.

The National NAGPRA Program recently announced that they no longer had the services of a National Park Service law enforcement officer, who was conducting civil penalty investigations of museums. At this time, there is not one person whose job is to investigate allegations of failure to comply with NAGPRA. This is a loss to implementing the overall goals of NAGPRA.

III. Burden on Indian Tribes and Native Hawaiian Organizations, including the "NAGPRA - Culturally Unidentifiable Native American Inventories Database"

Both GAO reports include information that gives Congress and Indian country a better estimate of the number of Native American human remains and cultural objects repatriated and still being held in federal agency repositories. After 20 years, federal agencies have culturally affiliated about one-half of the Native Americans held in their collections, the museums have affiliated only about 15 percent (15%) of their collections, and the Smithsonian has only affiliated about twenty-six percent (26%) of their collections. This illustrates the great amount of work left to do as the "culturally unidentifiable" process places the research and request burden on Native Americans. The following statistics on repatriation give an idea of the amount of work completed and remaining to do (attached pie charts using these numbers):

Native American Human Remains Reported by Federal Agencies (31,314 Native Americans):
14,431 culturally affiliated
14,674 culturally unidentifiable
2,209 "undetermined" (listed as culturally affiliated in the NPS database, but the agency has not published a Notice of Inventory Completion)

Native American Human Remains Reported by Museums (135,622 Native Americans):
21,485 culturally affiliated
111,654 culturally unidentifiable
2,483 "undetermined" (listed as culturally affiliated in the NPS database, but the museum has not published a Notice of Inventory Completion)

Native American Human Remains Reported by the Smithsonian (19,780 catalog numbers)
5,280 culturally affiliated
340 culturally unidentifiable
14,160 "undetermined" catalog numbers-estimation (until a tribal request is received, the Smithsonian does not research a catalog number to determine whether the remains are culturally affiliated or unidentifiable)

The Makah-NATHPO research for the 2008 report found that the Culturally Unidentifiable Native American Database does not provide adequate guidance and basic information for Native Americans who want to proceed investigating the human remains of interest or which show promise to be affiliated. For example, there is currently no record of whether or not Native Americans have been contacted or consulted, there are no serial numbers or a way to determine which record is being referenced when seeking additional information, and there is no "user guide" for how to use the database.

For Native Americans interested in a repatriation claim from the Smithsonian, they have to review about 15,000 records and then submit a claim, thus starting a lengthy process. The burden placed on Native Americans to conduct this work is extraordinary and additional funds and resources are required if they are to indeed bring home their ancestors and cultural items.

IV. Resources

One of the issues that was studied and discussed in the 2008 report was whether or not there were adequate resources to comply with the Act. We sought input from both Federal agency officials and representatives of Indian tribes and Native Hawaiian organizations. Our work determined that in 19 years, the repatriation process has evolved to be a time consuming and expensive endeavor and even then, the repatriation process does not ensure that remains or cultural objects will be repatriated. Two possible solutions are (1) to infuse the program with much more federal support; and/or (2) to improve the process.

The lack of Federal staff dedicated exclusively to carrying out compliance activities was also cited as a major problem. The Makah-NATHPO report recommended that additional appropriations be made to ensure that each agency has adequate staff. Related to this, was the lack of training for Federal staff who are assigned responsibility for NAGPRA implementation. We recommend that additional funds be appropriated to ensure that Federal officials receive adequate training and staffing levels, which they have identified as a need.

Since 1994, the U.S. Congress has appropriated funds for grants to museums and Indian tribes to carry out NAGPRA activities in two categories: (1) consultation/documentation; and, (2) repatriation. Those funds have been inadequate to effectively address the mandates of the Act. Insufficient resources prevent Native Americans from maintaining robust NAGPRA programs and the needed effort to ensure protection and repatriation of a tribe's cultural resources. NAGPRA consultation/documentation grants to tribes and museums – which are one of the only sources of funding for Native Americans in the field of cultural preservation – have decreased in the past five years. An assessment of overall grants awarded between 1994 and 2007 indicate that proportionately fewer of the funds appropriated for this purpose are actually being allocated. We recommend an increase in the amount appropriated for grants, and that Congress ensure that these funds are only used for grants and not for administrative activities. If additional funds are needed for administrative activities, there is a separate line item to which additional funds could be made available.

V. Future Areas of Investigation and Research

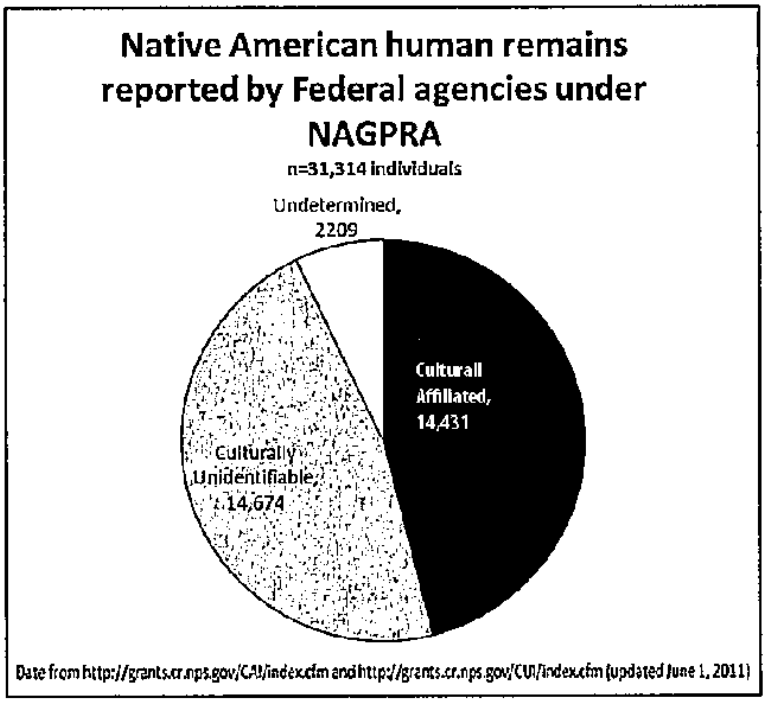
One of the main goals of the Makah-NATPO report was to identify where improvements might be made in the implementation of the Act and to present the information in terms of findings and recommendations. NATHPO continues to recommend that the Congress seek to:

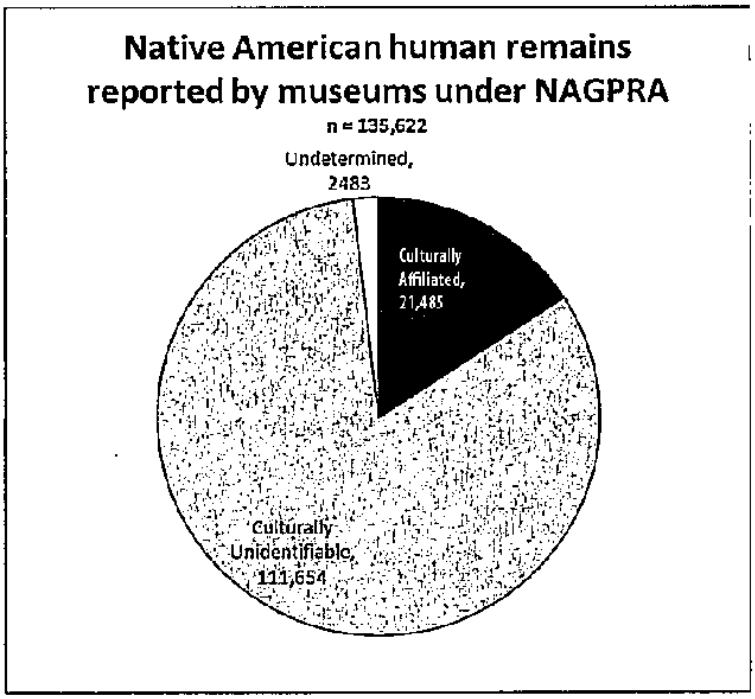
1. Evaluate museum compliance with NAGPRA, similar to the Federal agency audit completed by the GAO
2. Examine how the unassociated funerary objects have been dealt with in the repatriation process
3. Examine how the Future Applicability (Sec. 10.13) provisions are being implemented
4. Examine the background process that led a Federal agency to determine whether human remains and associated funerary objects was to be entered into the CUNAID, including the process used in working with and notifying tribes of the remains and objects.

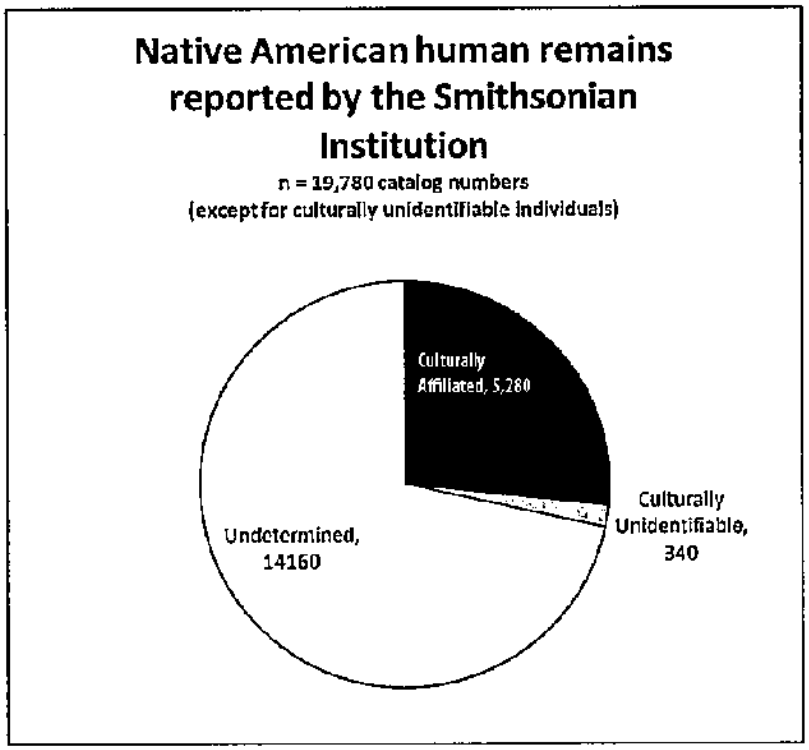
Conclusion

NATHPO has been working to overcome historic practices and behavior toward Native people. We support local tribal efforts for control of their respective histories and culture. We support a tribal agenda that goes beyond merely educating and reacting to situations that are many times beyond our control. Native Americans have many reasons to be proud of their work in seeking the return of their ancestors and cultural objects and we hope that the Committee will continue supporting these local efforts and will have more opportunities to visit Indian country and hear from Native people on these important federal laws.

Charts attached.


Native American human remains reported by Federal agencies under NAGPRA
n=31,314 individuals
Undetermined, 2209
Culturall Affiliated, 14,431
Culturally Unidentifiable, 14,674
Date from http://grants.cr.nps.gov/CAI/index.cfm and http://grants.cr.nps.gov/CUI/index.cfm (updated June 1, 2011)


Native American human remains reported by museums under NAGPRA
n = 135,622
Undetermined, 2483
Culturally Affiliated, 21,485
Culturally Unidentifiable, 111,654



PREPARED STATEMENT OF ROBERT W. TREPP, MEMBER, LOCA'POKV TRIBAL TOWN, BEAVER CLAN, AND MUSCOGEE (CREEK) NATION

Mr. Chairman, Mr. Vice-Chairman, and Members of the Committee: I am a member of Loca'pokv Tribal Town and its Beaver Clan, and an enrolled member of the Muscogee (Creek) Nation, a federally recognized tribe with a nation-to-nation relationship of long duration with the United States. The Muscogee Nation's first Treaty with the United States was ratified in 1790, the last action which the U.S. Senate took when the U.S. Capitol was in New York City. In Article Ten of the 1866 Treaty between our two Nations, the United States recognizes the cultural rights of the Muscogee Nation and its citizens and guarantees them in perpetuity:

> **ARTICLE 10.**
> The Creeks agree to such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian territory: Provided, however, [That] said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs. *14 Stat. 785*

Muscogee citizens respect the federal repatriation laws as human rights and civil rights, but also as treaty rights.

I am a charter member of the Board of Directors of the Inter-Tribal Sacred Land Trust, a non-profit Tennessee corporation founded for the express purpose of protecting Native burials and cultural sites. I appeared before this Committee on July 17, 2002, and testified regarding the protection of sites and burials in the southeastern United States.

I would like to offer my full support to the "or was" amendment to NAGPRA, which is an essential technical amendment to restore the original intent of Congress in the statute regarding both the temporal and geographical definitions applied to

the jurisdiction established by law. I encourage the Congress to enact this provision immediately, as it is necessary for the administration of NAGPRA as first envisioned by this Committee and intended by Congress. I would also like to offer my support for either an administrative rule change or legislative action, which clarifies that, *first,* no human remains or associated funerary objects should be classified as "culturally unidentifiable" without (a) full disclosure of all field notes and accession notes to any tribal government with a cultural affiliation or certain geographical relationship to the burial or object, and (b) the consent of the culturally affiliated tribal governing body(ies); and, *second,* that "culturally unidentifiable" objects found with human remains are not to be separated at any time or by any decision made under NAGPRA; and, *third,* that "culturally unidentifiable" objects not found in a burial context, or of an unknown context, be reviewed as above as possible "items of cultural patrimony," giving full weight to the analysis of the culturally affiliated Tribe(s) or Nation(s) and its(their) traditional religious leaders. If necessary, I can provide additional analysis of the ways museums, colleges and federal agencies have used the phrase "culturally unidentifiable " to avoid the pure intent of the law. The great majority of these human remains and associated funerary objects are *unidentified, but not "unidentifiable."* Those which truly are unidentifiable are of no scientific value and should be repatriated to the Tribes and Nations in the region of "discovery" for decent return to a natural environment.

Holding repositories often apply another term, "culturally unaffiliated," to a Tribe(s) or Nation(s), implying that it(they) do not have standing to repatriate people or objects because they are not culturally affiliated with the Tribe or Nation that no longer can speak for itself. This is a blatant misapplication of the law and misuse of a term that was intended to address the very circumstances involved when human remains and funerary items of the dead have no modern Tribe or Nation to make the repatriation application. NAGPRA intended for the living Tribe(s) or Nation(s) to speak for the dead as a culturally affiliate(s), related by geography or confederation or language or ceremony or any other aspect of cultural affiliation. Repatriations were done prior to repatriation law, and since, by culturally affiliated Tribes and Nations and by coalitions of culturally affiliated Tribes and Nations. When the holding repositories use "culturally unaffiliated" and other such terms, they usually do so in an effort to hold on to the people and objects in their possession by casting doubt on the Native identities and relationships, which often are a living part of oral histories and songs not necessarily known to the collections' "experts." Not only Muscogee oral history, but all current evidence from scientific study shows that the Muscogee confederacy is just that—a confederacy of tribes, large and small, which originated or moved into the southeast at different times and grew to share a common religion, common languages, and common cultural norms, only pressured into a common government by the powers of England, France and Spain. The academic terminology of "pre-Creek" or "pre-Muskoghean" or "pre-Columbian" or "pre-history" are fictions, as both traditional and scientific evidence show, and used by people who thwarted NAGPRA repatriations and receive federal monies to do so. This and other terminology such as "woodland" or "archaic" are feeble attempts to ignore our identity as a confederacy. *I reject the efforts of academics and bureaucrats to re-define the culture and history of my own people for these limited purposes and in the face of clear and convincing evidence.*

I further implore the Committee to enact a statutory right of action for Native American Tribes and Nations to defend our sacred places in court. As you well know, the U.S. Supreme Court opined in 1988 that we do not have such a door to the courts and that Congress would need to make a special law for this purpose. It is indeed unfortunate that no action has been taken in nearly a quarter-century. Justice delayed is justice denied, and this is a significant issue, not only to Native people, but to the audience of world opinion upon which the international reputation of the United States relies. The United States was quick to denounce the destruction of ancient monuments in Afghanistan, but places of great significance to Native people are destroyed frequently within America's borders, and sometimes by federal agents and federal permission.

Finally, I must raise an issue which I did not hear in earlier testimony. Because of the movement of tribes caused by colonization and western expansion (codified as federal policy in the Indian Removal Act of 1830), it is essential that no tribal government have the sole power to authorize the disturbance of the cultural site of another federally recognized Tribe or Nation without the prior consultation with that Tribe resulting in a mutually ratified Memorandum of Agreement enforceable in federal court.

I recommend that the Committee instruct members of both the majority and minority staff to prepare a full bipartisan report to the Committee on this issue. One case study which should be included in that report is the almost complete physical

destruction of the site at Hickory Ground outside Wetumpka, Alabama, by the Poarch Band to build facilities for gaming and for tobacco sales. This is a burial, ceremonial and historical site to which the Poarch Band has no cultural affiliation or historical relationship whatsoever. In fact, the Poarch Band sees themselves as historic "enemies" of the main—forcibly removed—body of Muscogee peoples. The Poarch Band secured this site—the last Capitol of the Muscogee Confederacy before removal—by using federal funds for its protection, and has defrauded the United States by its subsequent actions. They have treated burials with total disrespect. The sacred landscape of this historic site has been bulldozed and partly paved. The Poarch Band has disputed every effort by the Hickory Ground leaders and people (citizens of the Muscogee Nation in Oklahoma) to protect the site and its burials. While I am sure there are other sites where Tribes have cooperated in full respect for the culture of another people, this one case will clearly demonstrate the abuses which are not only possible, but easy to document sufficiently to the Committee that this type of situation can lead to events in total violation of the spirit and intent of NAGPRA, as well as religious freedom and historic preservation laws.

I take great pride in being able to address this Committee again on behalf of the Muscogee people and, humbly, in the place of our traditional religious leaders, who are at the most important point in their annual ceremonial cycles and could not have testified at this time of year.

PREPARED STATEMENT OF DR. ROSITA KAAHANÍ WORL, VICE CHAIR, SEALASKA CORPORATION

My name is Dr. Rosita Kaahaní Worl. I serve as the Vice Chair of the Sealaska Corporation, a Native corporation created under the Alaska Native Claims Settlement Act of 1971 (ANCSA), and the President of the Sealaska Heritage Institute, located in Juneau, Alaska.

I am also a member of the NAGPRA Review Committee, having served on the Committee for 11years. It is in that capacity as well as administering a NAGPRA program that I have had the opportunity to develop an in-depth understanding of how the Act has been implemented over the past 21 years, and to experience some of the challenges associated with the repatriation process that the Act authorizes.

As the members of this Committee know, ANCSA was enacted to settle the aboriginal land claims of Alaska Natives. Through that Act, the Congress authorized the establishment of Alaska Native regional and village corporations as the instruments through which the Act's objectives would be implemented. Since that time, Congress has enacted over 100 laws that define the ANCSA corporations as "Indian tribes" or define ANCSA lands as "Indian lands". [1]

NAGPRA Grants

ANCSA corporations have made significant contributions to the implementation of the NAGPRA, providing benefits to Alaska Native communities and contributing to the survival of Native cultures. Alaska Native corporations and Alaska Native tribes have participated nearly equally in the implementation of the Act. For instance, from 1998 through 2008, twelve Alaska Native corporations administered $2,294,194 in NAGPRA grants while seventeen Alaska Native tribes received $2,409,684 in NAGPRA grants during the same period.

NAGPRA Repatriation Claims

Fifteen Alaska Native corporations have made successful repatriation claims for 1,730 cultural objects [2] and thirty-nine Alaska Native tribes have made successful repatriation claims for 526 cultural objects.

NAGPRA Review Committee

Three Alaska Natives have served on the NAGPRA Review Committee, and at least one such NAGPRA Review Committee member was nominated by an ANCSA corporation and the others were nominated by Alaska Native tribes.

Alaska Native Corporations Contributions to NAGPRA

The inclusion of Alaska Native corporations in NAGPRA has provided benefits to Native people throughout Alaska and the lower 48 States. Regional ANCSA corporations, like Sealaska Native Corporation, have used their NAGPRA grant funds to provide training for village corporations and tribes within their region to enhance

[1] Sealaska Report ANCSA Corporations and the Definition of ″Tribe″ 1999. An updated report is in the process of being finalized.

[2] Of this total, 1,600 objects were individual glass beads.

their understanding of the Act's provisions and to build capacities to participate in the repatriation processes that the Act authorizes. ANCSA corporations have also dedicated their corporate funds to support NAGPRA activities. For instance, because NAGPRA grant funds are not available to support costs associated with dispute requests to the NAGPRA Review Committee, ANCSA corporations that have initiated such requests are bearing the costs of those activities.

Some Alaska Native tribes have recently made decisions not to participate in NAGPRA because they do not have the resources to support ongoing NAGPRA programs without the benefit of NAGPRA grants and supplemental organizational funds. In these instances, tribal members have called upon ANCSA corporations to file their repatriation claims. Likewise, Alaska Natives, who do not live within communities represented by a tribal government have called on ANCSA Corporation to initiate their repatriation claims.

During the time that I have served on the NAGPRA Review Committee, I and my fellow committee members have observed an ever-increasing escalation in costs associated with either making repatriation requests or seeking the committee's review of disputes. The dispute resolution process is often lengthy and sometimes results in costly litigation if the review committee's determination is not accepted by the parties to a dispute. In Alaska, the organized Native groups that are best able to make these now sizable investments in the return of Native remains and cultural items are the Alaska Native corporations.

In addition, under the Alaska Native Claims Settlement Act, Alaska Native corporations are the statutorily-designated owners and managers of Native lands—they are thus the first entities to which federal agencies would typically turn in determining the cultural origins and affiliations of objects of cultural patrimony. And in a provision of Federal law enacted in 2004 and made applicable to all Federal agencies, Public Law 108–447 directs Federal agencies to consult with Alaska Native corporations.[3]

In recent times, as a function of the Government Accountability Office's findings, there has been some debate associated with the inclusion of Alaska Native corporations in the NAGPRA regulations, and the Interior Solicitor's Office has opined that because the Congress employed similar terminology in the 1994 Federally-Recognized Tribes List Act and in the 1990 Native American Graves Protection and Repatriation Act, the definitions in one Act should constrain the interpretation and application of the earlier-enacted law.

However, it is not only critically important but imperative that each Act be examined within the context of Federal policy and the objectives that the Congress sought to achieve in each Act. The 1990 enactment of the NAGPRA was built on the foundation of assuring that cultural properties would be the subject of the congressionally-authorized repatriation process—and that such properties would be returned to the rightful owners or keepers of objects of cultural patrimony. The Act had less to do with Native governance and more to do with Native cultures. That the cultural context was what informed congressional intent behind the Act is found in the unusual inclusion of traditional Native American religious leaders as it relates to sacred objects.

In contrast, the 1994 Federally-Recognized Tribes List Act has its foundation in the government-to-government relationship between the United States government and tribal governments. The Act is intended to reflect the United States' recognition of the sovereignty of Native governments, and to assure that all Native governments are treated equally under Federal law and policy.

Thus to predicate the interpretation of a law enacted in 1990 on a retroactive application of a law enacted in 1994 that is based on a distinctly different policy foundation, leads to misinterpretation of Congress' intent in wanting to assure that the repatriation policy was and is to apply to all Native people across the United States.

Accordingly, I would urge the members of Senate Indian Affairs Committee to consider an amendment to the NAGPRA that provides the means for Alaska's Native people to fully participate in the Act's repatriation processes and to more effectively realize the goals of the Act.

Another critical component of the Act requires museums to file summaries and inventories, and yet, we know of one museum in the Northwest area that sold its collection of cultural items that were subject to the NAGPRA without compiling a summary or inventory. We believe that the burden of proof should be on a museum to document that deaccessioned items are not subject to NAGPRA, as opposed to the position that has been taken by the National NAGPRA Program Office—which is that the burden of proof should be placed on tribes and Native organizations.

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[3] Pub. L. No. 108-447, 118 Stat. 2809, Dec. 8, 2004.

Clearly, the policy of the Native American Graves Protection and Repatriation Act is to protect Native American human remains and objects of cultural patrimony and to assure that they are repatriated to their rightful owners. The Act does not authorize Indian tribes and Native organizations to act as unfunded law enforcement agents charged with detecting violations of the Act or noncompliance with the Act, nor does it assign the burden of proof to Native entities to police the actions of museums and document the origins of deaccessioned objects.

Finally, the members of the Committee are aware that the National Museum of the American Indian Act (NMAI Act) was enacted into law in 1989—and thus while preceding the enactment of the NAGPRA, the NMAI Act includes provisions similar to, but not identical to the provisions of the NAGPRA which authorize the repatriation of human remains and cultural objects. Nonetheless, the Government Accountability Office has recently completed an examination of the Smithsonian Institution's implementation of the repatriation provisions of the NMAI Act and found them lacking. [4]

Native groups have also expressed concern that the NMAI Act has been interpreted by the Smithsonian Institution as applying only to Smithsonian's Natural History Museum, the GAO concluded that "the statutory language and its legislative history do not support that view." [5]

As has been discussed in various forums on the NAGPRA, tribal commentators, as well as representatives of museums and scientific institutions, have expressed the view that the Congress should act to extend the provisions of the NAGPRA to all museums within the Smithsonian Institution.

I thank the U.S. Senate Committee on Indian Affairs for affording concerned Native people the opportunity to share their views on the implementation of the Native American Graves Protection and Repatriation Act with the Committee and the Congress.

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[4] U.S. Government Accountability Office Report to Congressional Requesters, May 2011, entitled ″Smithsonian Institution: Much Work Still Needed to Identify and Repatriate Indian Human Remains and Objects″, GAO-11-515.

[5] I.d., page one, GAO-11-515, Smithsonian Repatriation.

PREPARED STATEMENT OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

Introduction

The Salt River Pima-Maricopa Indian Community (SRP-MIC) is located in Central Arizona, nearest the city of Scottsdale, Arizona. The SRP-MIC consists of a confederation of the O'Odham and the Piipaash cultures, which are two different and distinct cultures with unique histories and languages. The SRP-MIC (and the Gila River Indian Community of the Four Southern Tribes of Arizona) claim aboriginal territory of 3.8 million acres of South Central Arizona as adjudicated in 1970 by the U.S. Indian Claims Commission through Docket 228. The Four Southern Tribes of Arizona currently use the combined adjudicated land claims area of the SRP-MIC the Gila River Indian Community, the Ak-Chin Indian Community, and the Tohono O'Odham Nation as a basis for consultation although recent anthropologic studies now recognize the aboriginal use area of the O'Odham, Piipaash, and their ancestors existing eastward into present day New Mexico, northward into present day Utah, west to the Pacific Coast, Southward of the Sierra Occidental into Mexico (where there are still O'Odham villages that are a part of the Tohono O'Odham Nation.)

The O'Odham culture consists of four present-day federally-recognized tribes that have a shared language, history, culture, and religious beliefs. This group is commonly known as the Four Southern Tribes of Arizona (referred to in the remainder of the comments as the Four Tribes) and consists of the SRP-MIC the Gila River Indian Community, the Ak-Chin Indian Community, and the Tohono O'Odham Nation. The Four Tribes have a relationship of shared group identity that can be traced historically and prehistorically between the Four Southern Tribes of Arizona and the people that inhabited the southern Arizona and the northern region of present day Mexico from the time when the first people walked these lands in time immemorial. We base our cultural affiliation claim on geographical, archaeological, linguistic, oral history/oral tradition, and historical evidence based on current standards of scholarship in the respective disciplines. The Four Tribes claim cultural affiliation to the archaeological cultures as well as to all others present in our aboriginal claims area during the Prehistory of what is known as Arizona and Mexico today. These affiliations include several archaeological cultures including (but not limited to) the Archaic, Paleo-Indian, Hohokam, Salado, Patayan, and Sinagua.

Comments

These comments were drafted in response to the solicitation for Indian tribes, Native Hawaiian organizations, museums, Federal agencies, and members of the public to provide comments in Anticipation of the Discretionary Review of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA).

The main principles of NAGPRA are to provide for the protection of undisturbed burials, and to provide a mechanism for the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Native American groups for culturally appropriate disposition.

NAGPRA strives to soothe and correct the injustices inflicted on Native peoples that occurred due to the disturbance and destruction of sacred burial places of our ancestors and the wrongful collection of objects that are vital to continuing our traditional way of life. The SRP-MIC supports the many of the changes to the rule as recently amended, and provides further comments as solicited for consideration in the development process to provide direction and guidance for future discretionary review. These comments are to address two specific topics: (1) Needed amendments to existing 43 C.F.R. Part 10 for corrections, clarifications, or refinements, and (2) comments on specific changes recommended. The comments are arranged by section.

The people of the SRP-MIC and the Four Southern Tribes of Arizona have deep and binding ties to one another and believe that the health and continued existence of our communities relies on these bonds. We hold the belief that people are more than physical beings, and people do not cease to exist (spiritually) or to have ties to this earth at the time of death, but go on to a new world where they continue in a new form of existence only if their physical remains from this world are allowed to continue the natural progression undisturbed until their return to the earth, when the entire body breaks down and is undistinguishable from the dust. We also believe that all objects placed intentionally with a burial must be kept with the body and subject to the same disposition of the associated remains. The SRP-MIC acknowledges the great importance of advancement to an equitable resolution for the many individuals currently awaiting disposition and looks forward to the time when all of our people are treated with the respect and dignity that all people deserve.

Title 43: Public Lands: Interior

PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

These comments were generated somewhat broadly to address issues that hamper the overall NAGPRA process. There are issues that are very complex and tend to affect several different sections, which makes it is difficult to generate comments or suggest changes without going into a longer and more thorough discussion. In working on these comments it is very clear there is a need for the National NAGPRA, the NAGPRA Review Committee, Native American Tribes/Groups, and Congress to engage in extensive continued consultation to solve the more pervasive problems all parties face in working with NAGPRA.

Subpart A—Introduction
§ 10.2 Definitions.

- Expand "Items of cultural patrimony" to include intellectual property like songs, oral history recordings, photos of burial practices, rituals, ceremonies, and digitization files of this information.
- The SRP-MIC supports the definition of "Native American" means of, or relating to, a tribe, people, or culture, that is or was indigenous to any geographic area that is now located within the boundaries of the United States.
    - Material cultures designated by the discipline of archaeology (for prehistoric discoveries) are arbitrary and generally do not accurately describe the existing

cultural ties between groups of people through time and space that are described in oral history. Even documented oral history by ethnographers often failed to accurately record information due to misinterpretation of information where observers used their own cultural background and biases to describe people with totally different ways of life.
    - Some documented oral history failed to include information because recorders failed to understand the importance of oral history and didn't record portions that didn't answer research questions at the time.
- " The term "Traditional religious leader" should be revised to emphasize that the tribe defines and appoints traditional cultural leaders using criteria determined by internal religious and cultural values. When a tribe or community officially names or designates a traditional religious leader, and makes an official statement to the National NAGPRA Program (or NRC) no other official or entity (including the Secretary of the Interior, Designated Federal Officer or other federal government representative) has the right to deny or question the religious leader to "verify" that designation.
- The SRP-MIC recommends a revision of the term "culturally unidentifiable human remains" to "culturally unidentified human remains" to avoid suggesting there is no reasonable way to identify the individuals' cultural affiliation.
- The SRP-MIC recommends inclusion of a definition of the term "consultation" to include the following ideals
    - Definition of "consultation" should be developed with input from both tribal governments and federal agencies.
    - "consultation is a meaningful and timely process of open discussion and joint deliberations
    - Consultation should include discussion on potential issues, changes, or actions by a museum or Federal agency in possession of Native American cultural items
    - Consultation should include any lineal descendants, Indian tribes, and Native Hawaiian organizations with a right to claim such items.
    - Consultation should consider the views of others, in a manner that is cognizant of all parties' cultural values
    - Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty.
    - Consultation must recognize the needs for confidentiality with respect to places that have traditional tribal cultural significance and/or for cultural information that is not published anywhere in existing scholarly or other literature.

Subpart B—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony From Federal or Tribal Lands.

§ 10.3 Intentional archaeological excavations and § 10.4 Inadvertent discoveries.

- 10.3 & .4 should be amended to include provisions giving deference to previously reached agreements concerning treatment and repatriation where all the relevant and appropriate parties were involved in consultation and agreements so the final disposition of items happens in a more timely and respectful manner and to protect confidential resource locations and sensitive cultural information.

§ 10.5 Consultation.

- The SRP-MIC recommends the Secretary of the Interior direct National NAGPRA and the NAGPRA Review Committee to be more transparent and forthcoming with tribes during the NAGPRA Review Committee (NRC) nomination process prescribed in the act. The SRP-MIC and other members of the Four Southern Tribes asked for government-to-government consultation regarding the NRC nomination process and there was no reply or attempt to even listen to the tribes' concerns, questions, or problems.
- There must be reciprocity in terms of communications with tribal groups. When a tribe requests information or submits requests information on any NAGPRA process the NRC should be required to respond in a timely manner. To facilitate this process a comment portal on the internet can be implemented that would sort the NAGPRA related comments into specific categories that assign a specific priority to the comments and requests to allow the appropriate response within the prescribed time period.

§ 10.7 Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony. [Reserved]

See attached comments.

Subpart C—Human Remains, Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony in Museums and Federal Collections

§ 10.8 Summaries.

- The National NAGPRA program is digitizing all inventories and summaries for publication on the website. The Salt River Pima-Maricopa Indian Community (SRP-MIC) would like the opportunity to review the inventories and summaries before they are posted on the website. The SRP-MIC recommends redaction of the original documents to protect specific locational information to prevent looting or vandalism of any existing in situ burials or intact cultural resources and to protect important cultural information that the tribes do not wish to become public knowledge. We would also like a digital copy of any digitized files related to the Salt River Pima-Maricopa Indian Community when they are made available for data management purposes.
- Database information should have specific query features available to filter out Federal Register Notices for Collections that have been previously repatriated to reduce the amount of "database clutter" that confuses NAGPRA research and hampers implementation.

§ 10.9 Inventories.

- NAGPRA and its implementing regulations do not provide National NAGPRA or any other federal entity with tools to encourage or ensure that federal agencies within or outside of the Department of the Interior comply with the act. The civil penalties established in section 9 of NAGPRA do not apply to federal agencies; only to museums. Absent such tools, there are limited options for holding agencies that are not in compliance with the act accountable. In

addition, the mechanism that NAGPRA specifically provides to ensure federal agency compliance—lawsuits by nonfederal parties, such as Indian tribes, against federal agencies—is rarely used.

§ 10.11 Disposition of culturally unidentifiable human remains.

- There are issues that lie specifically in repatriation under Section § 10.11 because the preponderance of evidence seems to be subjective to the institution and at the discretion of the institution. In some cases tribes have no trouble establishing cultural affiliation and repatriating collections recovered after 1990 under Section § 10.8-4, while historic collections (sometimes from the very same sites or archaeological regions) are very difficult to repatriate even though the tribes have already repatriated numerous collections that are contemporaneous to the historic collections with no problems. Many of the people and objects represented in the historic collections have been in custody for longer than they lived.
- Traditional cultural information is generally not given the same evidential weight as published literature even though oral history is specifically listed as a line of evidence for establishment of cultural affiliation. Archeological information or ethnographic information may not even accurately record cultural information or may have provided inadvertent misinformation due to cultural and social as well as the existence of formidable language barriers.
- In some cases the institution/agency repository will not repatriate unless there is prior precedence that different museums have already repatriated remains from the discovery area and from the temporal period as the historic collections they are holding despite the tribes satisfying the lines of evidence for a preponderance of the law. In other cases the institution/agency repositories will not repatriate even if precedent and preponderance are both satisfied.
- There should be some safeguards for the tribes to protect them from having to continue to provide more and more cultural information to try to establish a preponderance of evidence. In some instances the consultations are viewed as "intelligence gathering" to establish additional research questions for the collections to be held longer.

Section 10.11 Disposition of Culturally Associated and Unassociated Funerary Objects

- Section 10.11 C (4) The SRP-MIC insists that NAGPRA regulations require the transfer of control of both human remains and their associated funerary objects to appropriate Native American groups as the new rule is not clear regarding disposition of associated cultural or funerary artifacts. It is inconsistent with United States common law to allow museums and Federal agencies to keep the associated funerary objects while requiring them to transfer control of the human remains.
- Funerary Objects represent offerings intended as gifts and spiritual offering to the deceased. Tribal members place offerings (funerary objects) with a deceased relative or fellow community member (whom are also considered relatives in a sense) as a religious practice that is a vital part of religious and cultural rituals performed at death on behalf of the deceased and for the living community. There is universal agreement that these items are the property of the deceased and no one should deprive the dead of his or her tributes from the living – which is also supported by legal precedent that states the living have an obligation to care for the dead. The disruption of a spiritual process (by burial disturbance and excavation) and then the appropriation of funerary objects is a violation of the tribes' religious freedom, and endangers the tribal members' health

and welfare to such an extent that the cultural agreements no longer need to be spelled out because they are so culturally ingrained. The placement of funerary objects, their protection, and the community's continued respect of those objects also gives the living comfort that at the time of their own death that the community will respect and honor them in the same way that all of our people have been honored and protected from time immemorial. In this way, we can also deduce the preference of the deceased in NAGPRA situations concerning the disposition of his or her body and funerary belongings.

- The SRP-MIC believes that human remains, funerary object, and unassociated funerary objects are imbued with equal spiritual status for traditional religious reasons. As such, the SRP-MIC objects to the appropriation of funerary object, and unassociated funerary objects by scientists for the purpose of future research. To allow for the retention of funerary objects as scientific specimens without the voluntary consent of the legally authorized representatives of the tribes dehumanizes the deceased and violates the religious rights of the living descendants. It also damages the relationships between the tribes and the scientific community, when a relationship of mutual understanding could be forged and further research could possibly be undertaken in a joint effort in a way that protects and honors their cultural beliefs.
- The SRP-MIC does not stand in opposition of scientific research in general, but insists that the basic humanity of ancient, prehistoric, historic, and contemporary people be recognized and protected in the same way that the remains of all other cultural groups are recognized and protected throughout the country regardless of cultural affiliation or the presence of next-of-kin. We believe that each and every Native American group has the inherent right to decide what is appropriate for their people, whether that be continued scientific study as approved through intensive tribal consultation and with their full cooperation; or the expedient repatriation and interment of the individual with appropriate ceremony, ritual, and observance.

§ 10.12 Civil penalties.

- Mandate that Federal agencies comply with the Act and its regulations.
- For civil penalties, "The Secretary must acknowledge receipt of an allegation of failure to comply and refer it to the appropriate authorities for investigation within 15 days."

Subpart D—General

§ 10.16 Review committee.

Review Committee Nomination Process

- Statutory requirements should be thoroughly explained on the website if not in the Federal Register notices.
- The National NAGPRA must ensure that all NAGPRA Review Committee (NRC) nominations are fairly screened to confirm that the nominees and nominating entities meet statutory requirements.
- This comment relates to the SRP-MIC comment made under § 10.2. The screening process must be open and transparent. The tribes and interested parties are unable to obtain information regarding the selection process. Inquiries were ignored or vague replies sent to mollify tribes.
- This comment relates to the SRP-MIC comment made under § 10.2. Specific requirements or desired experience for candidates should be listed in the Federal Register notices and in the statute. The Four Southern Tribes questioned the selection process, and the National NAGPRA Program stated the candidate for traditional religious leader was chosen because that person had

the appropriate educational background to fulfill the duties and responsibilities of the NRC. The Four Southern Tribes nominated two individuals based on their traditional religious leadership and extensive NAGPRA experience, but did not include information on educational background. Educational background was not listed in the register notices, nor was it requested by the NRC during the selection process, and it was unknown that educational background would be necessary in some manner to determine qualification of traditional religious leadership.

- This comment relates to the SRP-MIC comment made under § 10.2. The NRC screening process should be amended to include some mechanism to allow the tribes and traditional cultural leaders to adhere to their respective cultural mandates as needed. The Federal Register notices should require nomination of tribal representatives or traditional religious leaders it is the recognition of the Community as a whole to determine that a practitioner is a "traditional religious leader" as defined by internal cultural values.
- The tribally designated tribal religious leaders should not have to make statements to verify their authenticity of traditional religious leadership. "Verification" is offensive and suggests that the tribes are unable to identify a tribal religious leader without the approval of the National NAGPRA Program, NRC, DFO, or Secretary of the Interior.

National NAGPRA

- National NAGPRA should not be housed within the National Park Service. It is a conflict of interest and does not allow National NAGPRA enough authority to implement NAGPRA.
- National NAGPRA's training efforts are reaching the tribes for the most part, but the tribes find that the agencies don't have the same level of training or understanding of the process which hampers the repatriation process/NAGPRA requirements for federal agencies and increases consultation costs.
- Cultural Affiliation is difficult and some museums are arbitrary and capricious when evaluating cultural affiliation based on their own intentions to keep collections or to repatriate to a different tribe. Tribes must provide extensive information for some museums even though cultural affiliation was obvious to other museums. The National Park Service could institute training for museums and Federal agencies on how to determine cultural affiliation to establish a fair and consistent process for establishing cultural affiliation. The National Park Service could develop a template for the cultural affiliation reports that tribes can use.
- National NAGPRA faces a huge challenge in consulting with the tribal communities in the US. There must be a mechanism for consultation that allows for tribal attendance and meaningful participation. The round of conference call listening sessions to discuss this particular issue was not an effective method for conducting tribal consultation because it did not allow for question-answer sessions or discussion of plans for resolution of major issues.

Conclusion

In the recent NAGPRA hearing, the question was posed whether there could be resolution with the Act, or if a new statute should be developed. In some ways a new law would be best as there are many negative connotations with the Act that may be insurmountable. Until that time the tribes are more than willing to try and work together with the many entities to resolve the existing issues to facilitate repatriation.

PREPARED STATEMENT OF WILLIAM F. LIMP, PH.D., PRESIDENT, SOCIETY FOR AMERICAN ARCHAEOLOGY

Dear Chairman Akaka:

Thank you for holding the hearing, "Finding Our Way Home: Achieving the Policy Goals of NAGPRA." Implementation of the Native American Graves Protection and Repatriation Act is a very important issue for the Society for American Archaeology (SAA), which represents some 6,800 members who work in a range of settings, from academia to tribal governments. As an active supporter of the idea, passage and implementation of NAGPRA, and as one of the key organizations involved in drafting the original regulations, the SAA welcomes the opportunity to provide testimony on recent developments in the legislation that affect our members. Since passage of NAGPRA, the SAA has seen a considerable expansion of institutional and tribal collaborations as a direct outcome. This collaborative work continues to be a growing strength in archaeological investigations in the United States. NAGPRA has encour-

aged active engagement among institutions, agencies, Native American tribes and Native Hawaiian organizations through consultation as outlined in the regulations. The regulations have led to the development of relationships of trust and mutual understanding of the law.

Our understanding of this hearing's purpose is that it will address issues that have emerged resulting from the recent Government Accountability Office reports on NAGPRA (GAO–10–768 July 28, 2010) and the Smithsonian Institution/NMAI (GAO–11–515 May 25, 2011), and implementation of the final regulations on the Disposition of Culturally Unidentifiable Native American Human Remains (43 CFR 10.11). The SAA respectfully submits the following points of concern on these issues. We also note that the Society has provided detailed responses to the DOI (letter dated June 29, 2011) in response to their request for comments on the overall NAGPRA process. We have attached a copy of that letter for your reference. In particular we note that in these new regulations there are no contingencies under which a museum could hold culturally unaffiliated human remains, an oversight which we believe is in neither the public interest nor the interest of all stakeholders concerned.

1) We would like to express concerns about DOI's response to federal, tribal, and public comments on the draft regulations of 43 CFR 10.11 that were submitted prior to the implementation of the final regulations in May 2010. While many comments were addressed in the published notice, very few appear to have had significant impact on the development of the regulations from their draft to final form. Additional written comments were solicited immediately prior to the implementation of the final regulations with assurances given by representatives of the National NAGPRA office that these comments would be used for future revisions and/or amendments to 43 FCR 10.11. Given the upcoming discretionary review of the full NAGPRA regulations, will these additional written comments be revisited as well? This issue is critical one for the Society and its membership because many points of this section of the regulations remain unclear, inconsistent with the original NAGPRA regulations, and potentially harmful to the positive relationships that have developed among Indian tribes, Native Hawaiian organizations, museums, and Federal agencies over the past 20 years.

2) Funding in the form of NAGPRA grants has not increased in proportion with the increase in compliance and disposition activities required to implement 43 CFR 10 and particularly the new requirements of 43 CFR 10.11. Both tribes and institutions face an increased financial burden in conducting consultation, background study, and other associated activities. The GAO report supports our concern with funding shortfalls. For example, on page 28 of the GAO Report on NAGPRA, all Federal agencies identify lack of funding as the primary obstacle to compliance efforts. The U.S. Fish and Wildlife Service alone estimated that "it would cost $35 million and take 28 years to properly review all of [their] collections for NAGPRA items." Compliance requires qualified individuals, suitable facilities for maintaining inventoried human remains and cultural items, time to engage in thorough consultation efforts, and resources for the processes of repatriation and disposition. All of these activities require substantial funding. The Society recognizes the significance of the comments of Senator Murkowski during the hearing regarding best practices and agrees that there are ways that the overall process could be streamlined for museums as well as Federal agencies to facilitate compliance, but funding will still be necessary. NAGPRA grants are an important source for compliance efforts for tribes and museums, and the Society urges substantially increased funding for this vital program.

3) We are also strongly committed to the continuation of scientific investigations of archaeological objects and skeletal remains that help illuminate cultural affiliation, past lifeways, or other important topics. NAGPRA seeks to balance the rights of Native communities to reclaim remains of their ancestors with the public interest in preserving, documenting and understanding our shared past. But these interests often overlap, and the Society would like to draw the Senate's attention to the importance of preservation of evidence of the past by museums, and the value of scientific investigations—when agreeable to all stakeholders concerned—in helping understand the past and advance the interests of Native communities, scholarly communities, and the general public alike.

4) GAO review of NAGPRA also examined the National NAGPRA Review Committee. The report identified concerns about inappropriate actions of the National NAGPRA Program in the appointment process of Review Committee members. In addition, the report notes that past appointees were unaware of how the appointments were made subsequent to the submission of nominees (GAO–10–768 July 28, 2010, Page 48). The Society agrees with the GAO report findings that the actions

of the National NAGPRA Program and the lack of transparency in the appointment process undermines the confidence of those who would use the Review Committee to facilitate dispute resolutions and for findings of fact. It is important that the appointments be made with the goal of providing a balanced panel of individuals representing all concerned parties. The Society would ask what measures will be taken in order to ensure a balanced process?

5) The Society would like to draw attention to two key issues of concern pertaining to the Review Committee's approach to the facilitation of disputes and findings of fact.

The fairness of the process. There is a wide perception that certain types of evidence and those who present them are not given equal treatment or value by the Committee. Representatives from both institutions and tribes perceive imbalances in time and attention accorded each side in disputes.

The weight given to the findings and recommendations of the Review Committee. Misunderstandings and frustrations abound regarding how parties should interpret and act on the findings and recommendations of the Review Committee. The law is explicit that the committee's decisions do not carry the weight of legal decisions and are strictly recommendations. Increasingly, however, those approaching the Review Committee for findings and recommendations either misinterpret the weight of findings and recommendations as carrying the weight of legal decisions or, conversely, want the Committee to be empowered to make findings that have the weight of legal decisions.

Overall, there is a lack of clarity on how the deliberations of the Committee are undertaken, and how parties who seek the guidance of the committee should respond to the Committee's findings and recommendations. The SAA asks what can be done to make the process more transparent, in order to ensure that those requiring the use of the Committee as a neutral party in the facilitation of disputes and findings of fact can do so with the confidence that the process requires?

In closing, the SAA wishes to underscore the continued need for maintaining consistency of process and balance in consultative relationships that have emerged in the implementation of NAGPRA. The concerns expressed reflect issues that pose potential hardships to all parties under the process outlined by the recent changes to NAGPRA and challenges to the continued success of achieving the policy goals originally established.

Thank you very much for your time and consideration.

Attachment

SAA

SOCIETY FOR AMERICAN ARCHAEOLOGY

June 29, 2011

Mr. David Tarler
Designated Federal Officer
National NAGPRA Program
National Park Service
1201 Eye Street, NW
Washington, D.C. 20005

Dear Mr. Tarler,

The Society for American Archaeology appreciates this opportunity to provide comments for consideration in the upcoming discretionary review of the full Native American Graves Repatriation Act (NAGPRA) regulations. As an active supporter of the idea, passage and implementation of the Native American Graves Protection and Repatriation Act, and as one of the key organizations involved in drafting the original regulations, the Society for American Archaeology is pleased to respond to the questions recently posed by the National NAGPRA Program, National Park Service: "(1) Based on 15 years of use, do the rules currently codified at 43 C.F.R. Part 10 need any amendments, such as (but not limited to) corrections, clarifications, or refinements?; and (2) If the answer is yes, then how should the rules be amended?" We commend the National NAGPRA Program for undertaking this discretionary review, and offer the comments that follow as constructive recommendations to provide greater clarity, efficiency and transparency to both NAGPRA requests and to NAGPRA compliance efforts, and to better achieve the balance of interests that lies at the heart of the legislation.

The Society is composed of some 6,800 members, representing a diverse range of interests, who promote the Society's goals of scientific and responsible archaeological research, cooperative stewardship of the archaeological record, and education of the broader public of the value of archaeological knowledge. In this, we believe that NAGPRA has worked well and the original regulations have proven robust, resulting in engagement and collaborative research involving Indian tribes, Native Hawaiian organizations, non-Federally recognized Native communities, museums, repositories and Federal agencies. Consultations among archaeologists, museums and Native communities, whether tribes or Native Hawaiian organizations, take place daily, and a new generation of scholars has grown up with NAGPRA as a basis for ethical research and practice. According to the most recent NAGPRA National Program repatriation summary (available at the NAGPRA Program's web site FAQ) repatriation actions to date have involved nearly 40,000 individuals and one million objects.

While the original NAGPRA regulations have been effective, we remain concerned by more recent developments over the past four years. This includes the drafting and implementation of the regulations on the Disposition of Culturally Unidentifiable Human Remains, or 43 CFR 10.11, and the recent Government Accountability Office (GAO) reports on NAGPRA and the Smithsonian Institution. In regards to 43 CFR 10.11, and associated sections 10.12 and 10.16, the Society maintains its previously stated position in our comments submitted to the Department on May 11th 2010 that these regulations, as

written, have the potential to harm the productive and collaborative relationships that have developed through the good faith efforts of institutions to repatriate human remains and objects covered by NAGPRA to descendant communities. Furthermore, the Society wishes to learn what actions will be taken in response to the two GAO reports, particularly regarding: 1) what will constitute full compliance and accurate reporting under the law, including penalties for failure, 2) what structural changes may be made within the National NAGPRA Program to help facilitate greater efficiency of compliance efforts by all parties; and 3) how the NAGPRA Review Committee will be managed to maintain the fairness of process defined within the regulations.

We are particularly concerned by this apparent erosion of balance in both recent rulemaking and in the actions of the Review Committee. The Act was premised on a balance not merely between the interests of tribes and scientists, where individuals might feel one or the other might take precedence, but on the crucial balance between the valid interests of Native communities to reclaim ancestral remains on the one hand, and the equally valid and vital public interest in the documentation, interpretation, and preservation of our shared human past on the other. Our comments are aimed at restoring a balance we believe has been lost in recent years.

While our comments are organized by section for your convenience, we wish to emphasize that our primary concerns are with the more recently promulgated regulations issued as § 10.11 Disposition of culturally unidentifiable human remains.

§ 10.2 Definitions.

- The definitions of *unassociated funerary objects* and *museums* need to be consistent between the law and the regulations. Currently they differ in ways that allow for confusion in interpretation. Suggested language for each is as follows with additions to the regulations in bold print and deletions struck through:
    - *Unassociated funerary objects* means objects **that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains** ~~those funerary objects for which the human remains with which they were placed intentionally~~ are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.
    - *Museum* means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds. **Such term does not include the Smithsonian Institution or any other Federal agency, as specified in §2 subsection 8 of the Act.**

§ 10.8 Summaries.

- There is an unnecessary duplication of effort in the publication of summaries in the Federal Register regarding *associated funerary objects* and *unassociated funerary objects* when these cultural items come from the same archaeological site. This issue also applies to sections **§ 10.9 Inventories** and **§ 10.10 Repatriation** (when applicable). Currently, two separate sets of documents are required to meet requirements for compliance with the regulations when these cultural items come from the same archaeological site. Given that the only difference between an associated and unassociated funerary

object is the presence of human remains either from the associated archaeological context or the holdings of the museum or Federal agency, we would suggest that the process be streamlined to allow for these cultural items to be published in the same documents. This would reduce the burden of effort for museums and Federal agencies, and, where appropriate, facilitate the process of repatriation.

§ 10.9 Inventories.

- The determination of the number of individual sets of human remains from sites with 1) multiple burials, 2) from mixed use sites, or 3) where the remains have been fragmented or disintegrated to a point where identification is uncertain leads to imprecision in the inventory process. This is recognized by forensic and bioarchaeological specialists and cannot be controlled for by the museums or Federal agencies during the inventory process. As a result, numbers of individual remains submitted in the inventories are not always correct and human remains can be missed or mis-identified as animal remains. Currently, when these errors are recognized, museums and Federal agencies must submit a new Notice of Inventory Completion and, in the case of culturally affiliated human remains, a new Notice of Intent to Repatriate. This is an unnecessary burden and we recommend developing a process to allow for an amended notice rather than submission of a new one. Similarly, minor changes in other kinds of information, such as identified categories of cultural items, might also be better served by amended rather than new notices.
- See also comments under **§ 10.8 Summaries.**

§ 10.10 Repatriation.

- As noted above with the inventory process, there should be a means of submitting an amended notice rather than a new Notice of Intent to Repatriate in cases where errors in the original inventory of human remains and/or the categories of cultural items have occurred and are simply being corrected.
- See also comments under **§ 10.8 Summaries.**

§ 10.11 Disposition of culturally unidentifiable human remains.

Please note: the first four points that follow reflect views previously stated to the Department in our May 11th, 2010 comments on the final rules for 43 CFR 10.11.

- The newly-created definition for the term "disposition" should be deleted. The statute uses the term "disposition" without definition, and parties have spent the past twenty years interpreting the term according to its ordinary meanings as they work together to consider and construct customized resolutions for human remains and cultural items in collections. Tribes, museums, and agencies should be allowed to continue developing customized resolutions that reflect the diversity of perspectives and interests involved. The new definition, requiring a "transfer of control," creates confusion about interpretation and appears to limit the potential opportunities for parties to customize resolutions.
- Section 7(b) of NAGPRA, accommodating scientific study under specific circumstances, should be extended to apply to culturally unidentifiable human remains as well as those already affiliated. The justifications underlying this provision apply equally to all human remains and cultural items. During NAGPRA's implementation over the past twenty years, mutually agreed upon forensic investigation has proven to be extremely valuable in resolving affiliation questions. Such activities can be expected to be even more useful in addressing the complex questions associated with currently unaffiliated human remains and they should be supported.

- Section 7(f) of NAGPRA, limiting liability for museums taking actions in good faith, should be extended to apply to dispositions under the new rule as well as repatriations under the statute. Museums carrying out their obligations under NAGPRA, whether involving repatriation of culturally affiliated human remains and cultural items or disposition of those designated as culturally unidentifiable, should be given consistent protection from challenges to their actions.
- Unilateral reburial by museums or agencies should not be an option proposed by the rule. Such a suggestion discounts the importance of appropriate cultural and spiritual contexts for reburials and fails to acknowledge any value associated with ongoing curation of human remains.
- Currently there is no specific time frame for full compliance with this section of the regulations, and the Society would argue against strict time frames for any section regarding compliance other than the standard 90 day requirement for the initiation of consultation under paragraph (b)(1)(i). Given the scope of work for consultation and documentation specified in this section it would be an unreasonable burden to require a deadline for completion of compliance efforts.
- Paragraph (b)(2)(ii) represents a controversial aspect of the regulations that is recognized by museums, Federal agencies, and Indian tribes. Given the multiple ways in which aboriginal lands may or may not be identified, there is a potential for conflict to arise during the consultation process as multiple claimants may have equal title. There is significant concern as to how 'aboriginal lands' would be defined, impacts on individual Indian tribes' rights to assert future claims based on how aboriginal lands are defined in this section, and how all potential parties involved would achieve a mutually agreeable disposition proposal. We recommend that the Department of Interior convene a task force of stakeholders to determine the nature of the process through which temporal and geographic affinity would be determined in a case-by-case basis for the specific parties involved.
- Paragraph (b)(4)(iii) is unclear as to what constitutes 'temporal and geographic criteria' that would be requested of Indian tribes with whom museums and agencies would consult. If this is linked to paragraph (b)(2)(ii), then the language should be revised to reflect this link. If this is not the case, then this section should be either clarified as to what it is requesting or deleted. As we noted above, we recommend that the Department of Interior convene a task force of stakeholders to determine the nature of the process through which temporal and geographic affinity would be determined in a case-by-case basis for the specific parties involved.
- Paragraph (c)(1) presents a paradoxical situation for museums and Federal agencies. Since the human remains in this section are, by definition, culturally unidentified, then it is impossible for a museum or Federal agency to prove right of possession as defined in section 10.10(a)(2) of the regulations. We recommend revised language acknowledging that museums represent appropriate repositories which may hold right of possession (albeit not title) to human remains absent a valid claim.
- Following on the last point, there is no stated contingency for the situation where culturally unidentifiable human remains may continue to be held in control by a museum or Federal agency. It is implied in the language of paragraph (b)(2) with the use of the word 'may,' but we recommend that this possibility should be more explicitly stated. This is particularly important in cases where cultural affiliation could be determined with additional study.
- Overall, the Society urges the Secretary of the Interior and the National NAGPRA Program to revise section 10.11 in a manner that recognizes the consensus-based process that has been a successful building block of the achievements of NAGPRA, rather than one that threatens the cooperative relationships that have developed between museums and American Indian communities over the course of the past 20 years.

§ 10.16 Review Committee.

- In reference to paragraph (b), there is increasing misunderstanding of the advisory nature of the Review Committee's recommendations, findings, reports, or other actions. The committee is

constituted as a requirement of the Act and subject to the Federal Advisory Committee Act. As such, it must be made clear to all parties who would use the committee for dispute resolution or findings of fact that all recommendations, findings, reports, or other actions are non-binding.

- Also in reference to paragraph (b), the Society recommends that the language be clarified by amending 'not binding on any person' to "not binding on any person, museum, or Federal agency".
- A general point in regard to the Review Committee is the GAO report findings regarding appointees to the committee. The report indicated that the National NAGPRA Office had interfered with the nomination process of members to the committee on more than one occasion. The Society agrees with the statement in the report that that this damages the credibility of the Review Committee, and we recommend that appropriate language be inserted into this section of the regulations to provide a level of transparency to the appointment process that is currently absent.

As stated in the opening of this letter, the Society continues to endorse the regulations as originally developed. However, the Society maintains its position in regards to its overall view of the problems inherent in the new regulations outlined in 43 CFR 10.11. The work inherent in making good faith efforts to comply with this section has increased costs both in time and money that is a potentially unreasonable burden on museums and Federal agencies. In addition, the process as outlined requires museums and Federal agencies to make decisions that are problematic, such as selecting criteria for determining aboriginal lands, which could lead to conflict and frustration over potential dispositions. Finally, the disposition process itself outlined in the new regulations is unclear on key points and is inconsistent with the rest of the regulations in terms of maintaining and recognizing the mutual interests of all parties involved. In order to resolve these concerns, clarifications and revisions must be made to this section to avoid causing undue harm to all parties involved.

Once again, the Society would like to offer our appreciation for the opportunity to provide comments on the existing 43 CFR 10 regulations in anticipation of the planned discretionary review, and we would be pleased to work with the Department of the Interior and the National NAGPRA Program in framing revised regulations to better accomplish the important goals of the Native American Graves Protection and Repatriation Act.

Sincerely,

William F. Limp, Ph.D.
President

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO TED ISHAM

Question. What resources are available and what resources are needed by the tribes to do the work of NAGPRA?"

Answer. Senator Akaka, I appreciate the question and as has been noted in my submitted written testimony, there are several areas of work to be done within NAGPRA to more effectively and efficiently repatriate the Ancestors that are in collections and on shelves. To allow these ancestors to continue their journey home is a moral duty that we all have.

- There needs to be made available an ombudsman, to work with the Indian tribes and federal agencies to help facilitate the repatriation process.
- There needs to be four full-time NAGPRA investigators employed to insure compliance.
- Seek to improve NAGPRA compliance by increasing the civil penalty amounts.
- There needs to be located and secured reburial sites on federally protected lands.
- NAGPRA Grants shall support projects that involve consultation with museums, universities, and institutions that receive federal funds.
- Support NAGPRA at the level of at least one million dollars for NAGPRA administration, and four million dollars exclusively for the NAGPRA grants.
- Urge the Administration to amend the rule on culturally unidentified (CUI) Human Remains, so that Human Remains and their Associated Funerary Objects (AFO) are repatriated together.

- Sponsor a legislative remedy by clarification of legal definition of "Native American" by enacting the "or was" amendment.
- Empower the GAO to continue investigations on the Museums for NAGPRA conpliance.
- The formation of coalitions to expedite the repatriation process needs to be given more weight when making a determination of cultural affinity to a group of Native Tribes.

From the Resolution passed by OCoT (the Oklahoma Coalition of Tribes)

A) An ombudsman be appointed to work with the Indian tribes and federal agencies to facilitate timely NAGPRA compliance and that four full-time NAGPRA investigators be employed within the Department of the Interior to ensure that museums, universities, and institutions that receive federal funds comply with NAGPRA; and

B) Seek to improve NAGPRA compliance by increasing the civil penalty amounts; and

C) Federal agencies, in consultation with Indian tribes, shall locate and secure reburial sites on federally protected land to be used by Indian tribes for the reburial of human remains and objects repatriated through the NAGPRA process; and

D) NAGPRA Grants shall support projects that involve consultation with museums, universities, and institutions that receive federal funds and hold federal collections; and

E) Indian tribes be provided with a copy of information that federal agencies submit to the National Park Service for inclusion in the Culturally Unidentifiable Native American Inventory Database, thus creating a process for directly sharing information with Indian tribes; and

F) Develop a NAGPRA tribal consultation policy for sharing information among Indian tribes, federal agencies, museums, universities, and institutions that receive federal funds that would include, but is not limited to, NAGPRA Inventories, Summaries, archaeological reports, and other relevant data; and

G) The Department of Interior shall promulgate the remaining reserved section(s) of the NAGPRA regulations; and

H) Support NAGPRA at the level of at least $1 million for NAGPRA administration, and $4 million exclusively for the NAGPRA grants to Indian tribes and museums; and

I) Federal agencies, museums, and institutions that receive federal funds shall participate in an annual consultation meeting with Indian tribes for the purpose of discussing policy-making, priority-setting, funding resources, and NAGPRA compliance, to be held in Oklahoma, the home of 39 federally recognized Indian tribes

Administrative Remedy

The policy goal of NAGPRA is that the Associated Funerary Objects would be returned to their respective Native American communities. We ask the Committee to urge the Administration to amend the rule on culturally unidentified Human Remains issued on March 15, 2010, so that the Human Remains are repatriated with their Associated Funerary Objects. The Associated Funerary Objects are the primary means of identifying the unidentified Human Remains—and the policy goal of that section of NAGPRA is to identify what the repositories claim as unidentifiable Human Remains. We are deeply concerned that the Associate Funerary Objects will be further separated from the Human Remains, making their identification even more difficult, if not impossible. The Administration claims that Congress did not make its intentions clear and that it cannot act without further guidance from Congress. We believe that Congress made itself clear in setting the NAGPRA policy goals, that the Department of the Interior through the National NAGPRA Program office substituted its judgment for that of Congress and that the Administration can revise the rule now and does not need to wait for Congress.

The lack of a publicly available and agreed upon tribal consultation policy and protocol for repatriation purposes remains a stumbling block to the achievement of the goals of NAGPRA. Consultation is a bedrock of the repatriation process and there needs to be consultation guidelines for the full range of Native cultural rights. Consultation with full participation of the tribes at all levels of the notification process is the only way to insure success of the repatriation.

Legislative Remedy

A technical clarification is needed in the legal definition of "Native American" by enacting the "or was" amendment that the Committee has recommended several times. Without the regulatory change and the technical amendment, we are impeded in our efforts to conduct repatriations and the institutions will continue to hold and "study" our Ancestors and associated funerary objects. This and other such blocking mechanisms make it very difficult for any tribe to complete the NAGPRA process.

Senator Akaka, I thank you for the time you and your Committee have given the Muscogee (Creek) Nation to weigh-in on this important issue.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. DANIEL K. AKAKA TO KEVIN GOVER

Dear Chairman Akaka:

As, you stated in your letter and as noted in my testimony, the Smithsonian agrees with many of the U.S. Government Accountability Office (GAO) recommendations.

You asked how the Smithsonian will prioritize and implement these recommendations and for a timeline on when these recommendations may be fully implemented. The GAO report's four principal recommendations concern annual reports, the jurisdiction of the Repatriation Review Committee (RRC), an independent appeals process, and policy on culturally unaffiliated items. The Smithsonian considers the recommendations to have equal priority and has taken the following steps to implement them.

1. The Smithsonian will prepare an annual report (fiscal year) on repatriation activities for Congress. The Smithsonian will ask the RRC to review and comment on the report prior to issuance to Congress. Because of the work schedules of the three participating institutions, the National Museum of the American Indian (NMAI), the National Museum of Natural History (NMNH) and the RRC, the report will be forwarded to Congress within twelve months after the relevant fiscal year.
2. The RRC is willing to serve as a resource to the NMAI Board of Trustees, if requested, to advise on repatriation matters. The NMAI Board of Trustees will have to consider and allow this change in policy, probably during their spring meeting in 2012. With permission of tribal claimants, NMAI is now providing repatriation reports to NMNH, and NMNH and RRC annual reports are being provided to the NMAI Director and Office of Repatriation.
3. In order to implement a fair and efficient independent appeals process, the Secretary delegated to the Director of NMNH the authority to issue decisions on repatriation claims made to NMNH. Appeals from a final decision of NMNH will be directed to the Under Secretary for Science. As for NMAI, the Undersecretary for History, Art and Culture and the Secretary, both *ex officio* members of the NMAI Board of Trustees, will recuse themselves from all repatriation decisions. Final decisions will be rendered by the NMAI Board of Trustees. Appeals from such decisions will be directed to the Undersecretary for History, Art and Culture. The NMAI Board of Trustees will review and consider this proposal at its next meeting.
4. NMAI has prepared a draft policy on culturally unaffiliated items and over the past several months has been soliciting comments from tribes. NMAI anticipates that the new policy will be available for Board of Trustee approval during FY 2012. NMNH does not declare items to be culturally unaffiliated because it presumes that as research and technical tools improve, all items subject to repatriation will eventually be affiliated. NMNH's repatriation policy will be amended to reflect this long-standing practice explicitly by Jan. 31, 2012.

Regarding Senator Cantwell's questions regarding the, Kennewick Man, the National Museum of Natural History is in the process of assembling a book on all the research findings, edited by Dr. Doug Owsley. It is scheduled for publication in early 2013. Dr. Owsley has been invited by the Wampanum Heritage Center in Beverly, Washington to present the findings and results, and has offered to do so prior to publication.

Thank you for allowing me to testify on this important subject and for your on-going interest in the Smithsonian Institution.

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